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Called to the Bar 1890. Died 1949

We print the following tribute from the Hon. Mr. Justice Vaisey :—

In my early days at the Bar my practice was almost exclusively in conveyancing, and " Fritz " Farrer was then already a recognised master of that difficult art. He pursued it during his professional life of nearly sixty years with a deep seriousness, amounting at times to an almost portentous solemnity. Upon every problem he brought to bear the full weight of his massive learning, and regarded each as a matter of extreme if not paramount importance. When, as sometimes happened, a decision of the Court met with his disapproval, his sorrow, rather than anger, would be distressing to witness. During a discussion of the Bills which became the " Birkenhead " Acts, I remember his saying, in tones of funereal gravity, that the combined wisdom of the whole of Lincoln's Inn was, in his opinion, incapable of devising an effective repeal of the Statute of Uses !

Men who take themselves and their work so seriously are apt to cause some amusement to those whose minds are perhaps more shallow, or whose interests are less concentrated and exclusive. So it was with " Fritz "; but the smiles were friendly ones, and his own gave a ready response. My acquaintance with him was slight, but I am glad to be allowed to offer this small tribute of respect to his memory. To such men as he, the law and those who study and practice it are much more greatly indebted than is sometimes realised.

H. B. VAISEY.

I knew " F. E. " not only as a valued contributor to this Journal and other legal periodicals but also from the more intimate contact of sharing the same chambers in his latter years. To one who has devoted much of his life to the study of the law and history of Real Property and Conveyancing, F. E. was a joy to meet and an inspiration to talk to. Bred in the great tradition of Fearne, Preston and Challis he was a master of the old learning, but his scholarly edition of *Key & Elphinstone*

(14th ed.) showed that he could equally well grapple with the Property Legislation even if he did not love it. But for all his scholarship he was essentially human and an abrupt manner concealed an exceptionally kind heart. We salute the memory of a personality who had thoroughly earned the title " counsel learned in the law ".

H. P.

CONVEYANCER'S NOTEBOOK

Gifts to hospitals.—Re Kellner's Will Trusts, [1949] 2 All E. R. 43 (see *ante*, pp. 322 and 377) has been overruled by the Court of Appeal which held that the gift to the " teaching hospital " did not fail by virtue of the provisions of the National Health Service Act, 1947. At the time of going to press no full report of the judgments is available so that the implications of the decision cannot be considered. It would appear that a distinction was drawn between the dissolution of the managing body and of the hospital itself. If this be the case some complications may occur depending upon the form taken in any particular legacy or other gift. It is necessary clearly to scrutinise the actual gift.

When the interest had vested before the appointed day the hospital is entitled whether or not it had fallen into possession : *Re Gartside*, [1949] 2 All E. R. 546 (*post*, p. 462).

Freedom under the Law.—Lord Justice Denning has just published his Hamlyn Trust lectures under this title (*a*). We make no apology for referring to them in this place although they are only indirectly concerned with conveyancer's law. These lectures, though designed to be understood by the " common people " and forming a brilliant exposition for the layman, should be studied by all lawyers. They bring together in a striking form, illustrated by forcible examples from our legal history, the underlying principles and practice of the Common Law for protecting the freedom of person, property and contract. This is not done without what we would respectfully describe as judicious criticism. The Common Law was not always right. The learned Judge proceeds then to describe, analyse and criticise the methods of Parliamentary amendment of the law and in particular he discusses the growth and character of administrative tribunals and also the powers of the Executive. In all this comparisons are drawn with foreign systems, particularly those of France and the Soviet Union. Here, too, the comparison is not entirely favourable to the Common Law, but we would particularly and respectfully commend the observation, made more than once, that a system suited to Englishmen is not necessarily suited to Frenchmen and *vice versa*. It is of particular interest that his Lordship is of opinion that we have not yet satis-

(*a*) *Freedom under the Law*. By the Rt. Hon. Sir Alfred Denning. London: Stevens & Sons, Ltd. 1949. viii and 126 pp. Price 8s.

factorily adjusted ourselves to the inevitable growth of administrative law and the power of the Executive. It is hardly necessary to remark that his proposals for development, such as that a right of appeal from administrative tribunals should always lie and that the appellate tribunal should be incorporated into the Supreme Court, are deserving of the closest attention. But one of his last sentences is even more pregnant: "Properly exercised the new powers of the executive lead to the welfare state: but abused they lead to the totalitarian state": and the learned Judge goes on to point out that in our time we have to deal with changes "of equal constitutional significance to those which took place 300 years ago". For all its air of simplicity and delightful style this is not only a learned book but a wise book and we should all learn from it.

"*Title*" *and the Town Planning Act.*—We have received the following communication:—

"I refer to the article in the current number of *The Conveyancer* entitled "Is the Permitted Use a Matter of Title?".

"The problem, which is largely terminological, revolves round the meaning given to the word 'Title' in relation to the word 'Land'. Kindred problems are involved in the much debated question whether the Town and Country Planning Act, 1947, has or has not transformed Conveyancing from dealings in land into dealings in 'Use' of land.

"It may be stating the obvious, but I venture to suggest that discussions such as these would be at least very much clarified if the word 'land' were used exclusively to denote the physical thing, that is to say something which can be perceived by the senses, the word 'Title' being reserved for and confined to the conception of legal rights or aggregates of them. For example, the mere presence or absence of a drain beneath the soil is a question affecting the 'Land' whereas the existence of a legal right, vested in some person other than the occupier of that soil, to use the drain is a question of 'Title'. The word 'Title' used in this sense means a legal right to use land in various ways or legal dominion over it, and I respectfully submit that that is its true and logical meaning. A deed of conveyance does not and cannot and never did transfer 'Land' because physical things can only be moved by physical forces and in any event land is immoveable. What it does is to confer or transfer a 'Title', *i.e.*, a legal right to use land.

"Once upon a time the grant of an unqualified freehold estate in fee simple no doubt conferred the right to use the land affected by the grant for any purpose whatsoever, but that was a very long time ago and long, long before the year A.D. 1947. In June of that memorable year, the range of purposes for which a freeholder could lawfully use his land was already severely restricted by public law and usually by private rights also. All that the Town and Country Planning Act achieved was, I submit, a further drastic curtailment of an already restricted range of lawful uses. The statute did not, I venture for the foregoing reasons to suggest, change the nature of 'Title' or the character of Conveyancing practice, but merely imposed further restrictions upon their already restricted scope or range. The

problem whether or no a particular factor affecting either land or the legal right to use it in a particular manner ought or ought not to be disclosed by a Vendor to a Purchaser (in the sense that a failure to disclose would render a contract voidable) seems to me to be concerned with a wholly different line of cleavage. The answer as your Contributor points out, turns largely upon issues of materiality and concealment, but not I submit upon whether the alleged defect affects legal dominion or is merely physical.

" The meaning which I have suggested is the proper meaning of the word ' Title ' is well brought out by the passage quoted by your Contributor from the judgment of Warrington, J., in *Pemsel and Wilson* v. *Tucker* [1907] 2 Ch. 191.

" While I am ' on ' the subject of the Town and Country Planning Act, may I refer to an entirely different subject?

" The Central Land Board has been at great pains to prevent, if need be by menaces, the sale of land at more than what they are pleased to call ' The restricted price ', but I am not at all sure that what they are endeavouring to do is not to restrict the price of land to some arbitrary and unauthorised formula of their own manufacture. Let me give an example of what I have in mind. Suppose that Mr. Jones had in June 1947 a number of building plots for sale at £*x* each, and suppose as frequently happened that a number of people, fully aware of the effect of the statute, were still prepared to give £*x* per plot twelve months later. Now, the proof of the pudding being in the eating, I submit that the ' Restricted value ' of the plots was their value in the open market, *i.e.* £*x*, but ' Not so ' says the Central Land Board—' Since the unrestricted value was £*x* the restricted value must be less than £*x* and you must either sell the land for £*y*—or else ! '. Now ' £*y* ' is arrived at by means of an abstract formula for valuing property for which there is I submit no statutory authority whatsoever.

" The ' restricted value ' is I submit the price which ' Joe Buggins ' will give for the land after the statute in the open market and not some hypothetical figure engendered in the minds of the Central Land Board and sought arbitrarily to be imposed by them."

With respect, we think that this letter displays the reasons for the *à priori* pronouncements by certain learned writers that " use " is not a matter of title. It supports the view that the 1947 Act did not substantially alter the law of real property.

We would respectfully suggest that both the points in the letter are based upon a fallacy, and we may draw attention to the view expressed in Cheshire, *Real Property*, 6th ed., at pp. 113–115, and in particular at p. 115 where the learned author remarks : " What is not so obvious is the complete change that it (the Town and Country Planning Act, 1947) has made in the character of the fee simple estate itself ".

The learned writer of the letter printed above assumes that the " title " is the same whether the owner has or has not a limited right of use only. Although he wishes to exclude " land " as the subject matter of " title " he does not allow that title differs where the use is restricted or where it is not. In fact, he would not deny that in the ordinary case a different title would be deduced where these limits

existed, *e.g.*, by virtue of restrictive covenants or limited ownership, than where they did not. The title would, indeed, determine the nature of the restrictions, *if any*. He does not seem to admit that now use is always restricted that a purchaser must, therefore, be entitled as a matter of title to know what the restriction is. " Title ", it is submitted, does not mean the " right to use land " or the " legal dominion ", but the evidence on which the claim to do so is based. That has been its consistent use in textbooks of authority for a very long time. The conveyance does not *confer* a " title "; it operates to convey an estate and as soon as this is accomplished and because it remains evidence of what has occurred it forms *part* of the " title ". It is, of course, the failure in so many decisions to draw these distinctions with clarity that make the subject difficult.

Authority apart, the reason why a purchaser is, in our opinion, entitled to evidence of the " existing " or " permitted " " use " under the Act, independently of any contract, is that what the purchaser now buys is a fee simple interest in the permitted use, that is, that the fee simple and the permitted use form one indistinguishable whole. He buys, in fact, nothing else than the restricted use, because the vendor has nothing else to sell. Therefore, unless the purchaser is told what the " use " is, he can scarcely enter into a complete contract because he does not know what he is buying, and unless the vendor *proves* what the " use " is the purchaser cannot reasonably be sure that he is getting what he contracted to buy. The difference between buying " agricultural land " and " light industrial factory land " is as obvious as between buying a Fordson tractor and a " Commer " lorry. A purchaser in the second case would certainly insist upon such a description and not limit it to " mechanically propelled vehicle ". Because in the past a fee simple has only required more specific description as " subject to the restrictions ", etc., where special restrictions have existed, there seems to be no ground for not accepting the necessity *in all cases* to be more specific today. And we respectfully suggest that our learned Contributor has demonstrated that the balance of authority as well as common sense demands it.

It is the failure to appreciate this aspect of what the vendor has to sell which leads to the second complaint in the letter printed here. " Joe Buggins " can in law only purchase the " restricted use ", because any other use must be purchased from the Central Land Board by a development charge if the change of use has any value. In fact, up till now there has been a tendency in many cases of undeveloped land to pay a price for the possibility of buying another use from the Central Land Board. This, of course, the vendor cannot sell because the possibility does not vest in him, and the Central Land Board are taking steps to prove this by buying what he has to sell, namely, the restricted use, at the price which a purchaser would pay for the restricted use without the supposed possibility, and then selling the restricted use to someone who is also prepared to pay the price for another use. The Central Land Board must pay the full price for what the vendor has, namely, the restricted use. The Central Land Board is entitled to, and indeed should, ignore the " possibility of buying another use ", because it is not the vendor's to sell. In our view it is inaccurate to suggest that the figure which will be paid, *e.g.*, for

agricultural land bought *solely* for that purpose, cannot be distinguished from the price paid by a purchaser who really intends to use it for another purpose. It is at present difficult to *determine* the amount of difference in price in the distinction because agents and others have not yet accustomed themselves to the changed conditions, but it was a familiar enough phenomenon in country sales before the war when agricultural land of the same quality and position was sold at totally different values depending upon the character of the purchasers. The vital point is to remember what the vendor is entitled to sell, or alternatively what is not his to sell. It is suggested that this position is made clear in the decision in *Sampson's Exors.* v. *Nottinghamshire C. C.*, 65 T. L. R. 376 (noted *post*, p. 461) because, although it is a case on compulsory acquisition, all land is now subject to such acquisition and the acquisition can apparently be made on behalf of any developer.

With deference, we suggest that this only underlines and emphasises the point that the question of " use " is as much a matter of title as the question of " estate "; indeed, that they have become one and indistinguishable.

ADDENDA

Page 573, Form 25, par. 10.—Mr. Withers writes to say that it is advisable to add after the word " hereunder " the words (not being the settlor or any woman to whom he shall have been married) and that though the words may not be necessary for surtax purposes, it is safer to have them in and that it was by mistake that they were omitted in the form as printed.

THE APPLICATION OF THE CONTRIBUTORY NEGLIGENCE ACT TO LIABILITY FOR DANGEROUS PREMISES

By Glanville L. Williams, M.A., LL.D., Barrister-at-Law

Although the Law Reform (Contributory Negligence) Act, 1945, abolishes contributory negligence as an absolute defence in tort, it was not the intention of the Act to extend the existing heads of liability in tort. Thus, although the Act applies to every duty of care where such duty existed at common law, it does not extend the scope of the duty. For instance, it does not extend the duty owed towards licensees and trespassers. It does not create an action for *de facto* negligence where no such action existed before. So also the question whether a breach of statutory duty gives rise to civil liability must be decided independently of the Act.

These observations raise an apparent difficulty with regard to the rule in *Indermaur* v. *Dames* (*a*). Willes, J., in the leading case, laid down the rule that the invitee " using reasonable care on his part for

(*a*) (1866), L. R. 1 C. P. 274 at 288, affd. L. R. 2 C. P. 311 (Ex. Ch.).

his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know". On one reading this may seem to assert that where there is contributory negligence on the part of the plaintiff there is no duty on the part of the defendant. The defendant's duty arises only where the plaintiff is using reasonable care for his own safety. Moreover, it is only a duty to see that there are no unusual dangers, and if the plaintiff apprehends or ought to apprehend the danger at a time when he can still avoid it by using reasonable care, it may be argued that the danger is no longer an unusual one for the plaintiff—in other words, it is no longer a trap for him, even though it is still a trap for other people.

The importance of this question under the Contributory Negligence Act is apparent. At common law it was not important, for if the plaintiff was guilty of contributory negligence he necessarily failed to recover, and it did not matter whether his failure was put upon contributory negligence *eo nomine* or upon absence of duty in the defendant. But under the Act, the statutory scheme of apportionment applies in cases of contributory negligence, but not where the defendant has broken no duty to the plaintiff.

The question has arisen in Canadian cases. In *Knowlton* v. *Hydro-Electric Power Comm.* (1926) (*b*) and *Greisman* v. *Gillingham* (1934) (*c*) it was held, without discussion of the legal difficulties, that the Canadian apportionment provisions applied as between occupier and invitee. Dean Cecil Wright doubted whether these decisions were reconcilable with the English authorities; but he did not disapprove them—he suggested that the Courts have changed the conception of the duty (*d*). The question received full discussion in *Whitehead* v. *North Vancouver* (1939) (*e*), where the two earlier cases were followed. The facts were that P, late at night, drove his car down a ferry slip, mistakenly thinking that D's ferry boat was there. He was drowned. The jury found both parties negligent (D because he had failed to provide a barrier to prevent cars from proceeding if the ferry had left), and an apportionment was upheld by the British Columbia Court of Appeal. It was pointed out that in so far as the rule laid down in *Indermaur* v. *Dames* was circumscribed by the requirement that the plaintiff should have been careful, this requirement was *obiter*, since no contributory negligence was found. In any case, when *Indermaur* v. *Dames* was decided contributory negligence (determined, of course, in accordance with the last-opportunity doctrine) was a complete defence, and there was no need to distinguish between the question of the scope of the defendant's duty and the defence of contributory negligence. Again, Willes, J., himself seems to have treated the question as one of contributory negligence, for after the words already quoted he went on to say: "And . . . where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, *and whether there was contributory negligence in the sufferer*, must be determined by the jury as a matter

(*b*) [1926] 1 D. L. R. 217; 32 C. R. C. 362; 58 O. L. R. 80.
(*c*) [1934] S. C. R. 375; [1934] 3 D. L. R. 472.
(*d*) (1939), 17 Can. B. Rev. 213–4.
(*e*) [1939] 1 W. W. R. 369; 53 B. C. R. 512, [1939] 3 D. L. R. 83 (C. A.).

of fact" (italics supplied) (*f*). Finally, whatever the interpretation of *Indermaur* v. *Dames*, Macdonald, J.A., was prepared to lay it down that "our Contributory Negligence Act alters not only the common law but also any proposition of law, judge-made or otherwise, that may stand in its way. It applies to all cases, without any exception, where the loss arises through the 'fault' or negligence of both parties (questions of fact for the jury) whatever the law may have been before its enactment".

The point that where the plaintiff knows or ought to know of the danger it is no longer an "unusual" danger *quoad* this plaintiff was not expressly considered in the judgments. But it is submitted that the point would be without substance. The modern tendency is in favour of construing the rule in *Indermaur* v. *Dames* in a wide way, as imposing upon the occupier the duty to take reasonable care to make the premises reasonably safe (*g*). In *Corporation of Glasgow* v. *Muir* (1943) (*h*) Lord Wright expressly said that the rule in *Indermaur* v. *Dames* is a sub-head of negligence. The reference in the leading case to "unusual" dangers need be taken as no more than the proposition of fact that if the danger is usual the occupier will not normally be guilty of carelessness in respect of it. It has been the besetting sin of the law of tort to turn propositions of fact into rules of law, this resulting in unnecessary complexity, and the reverse tendency that is now setting in is to be welcomed.

The application of the Contributory Negligence Act to cases of invitor and invitee raises the question whether the former common-law doctrine of last opportunity is in existence under the Act. If this doctrine survives it would seem to follow that an invitee who is guilty of contributory negligence at the time of the accident must usually fail to recover even under the Act, for the negligence of the invitor would usually be prior to his. The only way out of this difficulty on former common-law principles is to say that the negligence of the invitor is continuing. This appears to have been the line taken in *Greisman* v. *Gillingham*, where the jury expressly found that the plaintiff could by the exercise of reasonable care have avoided the accident (*i*), and yet it was held not to be ultimate negligence. So in *Whitehead* v. *North Vancouver*, Macdonald, J.A., said that the defendant's negligence in

(*f*) Cp. *Hillen* v. *I.C.I. (Alkali), Ltd.*, [1936] A. C. 65 (H. L.), where Lord Alness assumed that contributory negligence was a defence against an invitee, and called it by that name.

(*g*) Winfield, *Text-Book of the Law of Tort*, 4th ed., 559 ff. See, *e.g.*, *Dunster* v. *Hollis*, [1918] 2 K. B. 795, where Lush, J., held that the duty is not merely a duty to warn an invitee of concealed traps but is a duty to take reasonable care to keep the premises reasonably safe, and unless the invitee is guilty of contributory negligence the visibility of the danger is no defence.

The contrary proposition, that no duty is owed under *Indermaur* v. *Dames* to one who knows of the danger, is maintained by D. M. Gordon, "Wrong Turns in the *Volens* Cases", (1945) 61 L. Q. R. 144–6. Of the cases that he cites the strongest is *Griffiths* v. *London and St. Katharine Docks Co.* (1884), 13 Q. B. D. 259 (C. A.), where it was held that a servant who sues his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed must show not only that the master knew but that the servant was ignorant of the danger. It is submitted that the law has changed on both branches of the rule. A master is under a full duty of care with regard to plant (which includes premises); and a servant can recover although aware of the danger. See, *e.g.*, *Bowater* v. *Rowley Regis B. C.*, [1944] K. B. 476 (C. A.).

(*h*) [1943] A. C. 448 at 461 (H. L. (Sc.)).

(*i*) See the report in the Court below, *sub nom. Gillingham* v. *Shiffer-Hillman Clothing Mfg. Co.*, [1933] O. R. 543; [1933] 3 D. L. R. 134.

failing to erect a barrier was " a continuing act extending as a general act of neglect up to the last moment when the accident occurred. . . . In this view the negligence of the deceased and [the defendant] were contemporaneous ". More recently, however, the Ontario Court of Appeal has failed to take this view. In *Brown* v. *B. & F. Theatres, Ltd.* (1946) (*k*), P, at D's theatre, wished to visit the ladies' room, but by mistake went through another door marked " private " and fell down some stairs. It was held that P could not recover. Laidlaw, J.A., based his judgment on the ground that on the evidence D had not been negligent and (perhaps as an independent ground) that the duty was owed only where the plaintiff was careful, which on the facts this plaintiff was not (*l*). It is respectfully submitted that if this second reason is to be regarded as an independent one, the view of the British Columbia Court in *Whitehead* v. *North Vancouver* is to be preferred. Roach, J.-A. (with whom Robertson, C.J.O., agreed) based his judgment on a different ground, namely, that there was evidence of negligence in D, but that this negligence was too remote a cause of the accident, the operative negligence being that of P. (This was expressed by saying that D's negligence was the *causa sine qua non*, P's negligence the *causa causans*.)

It seems that the latter way of deciding the case in effect involves a re-introduction of the last-opportunity rules, all the more surprising because the rule had been thought to have been put on the shelf by the Ontario Courts. It is submitted that in this respect, too, the decision in *Whitehead* v. *North Vancouver* is preferable.

The only case in which any aspect of the question has been considered in England since the passing of the Contributory Negligence Act is *Horton* v. *London Graving Dock Co., Ltd.* (1949) (*m*). D was a contractor repairing a trawler; X was a sub-contractor, and P was X's workman. D provided a staging for the workmen to use in the performance of the work, and the only means of getting from one board to another on the staging was by stepping on an angle-iron. P knew of the danger, but on one occasion his foot slipped and he sustained injuries. Lynskey, J., held that P could not recover from D because once he came to know of the danger it could no longer be an " unusual " one for him; consequently D had not broken the duty under *Indermaur* v. *Dames* and no question of apportionment arose. This interpretation of the rule in *Indermaur* v. *Dames* as though it were a statute is not the usual approach of the Judges to a common-law rule, nor, it is respectfully submitted, is it a happy one. If the interpretation becomes accepted, it will mean that in actions under the rule in *Indermaur* v. *Dames* the plaintiff will be defeated even on facts that would not defeat him in respect of the defences of contributory negligence and *volenti non fit injuria*.

Although contributory negligence by an invitee should not exclude the occupier's duty of care, it is always necessary to consider whether

(*k*) [1946] O. R. 454; [1946] 3 D. L. R. 194 (C. A.).

(*l*) The learned Judge referred to *Pfister* v. *Toronto Transportation Comm.*, [1946] O. R. 328; 59 C. R. T. C. 289; [1946] 3 D. L. R. 71 (C. A.), which also was decided on the ground that the defendant was not negligent and (perhaps as an independent ground) that the duty towards an invitee presupposed that the invitee was not negligent.

(*m*) [1949] 2 All E. R. 169; cp. *Stowell* v. *Rly. Executive*, [1949] 2 All E. R. 193, where Lynskey, J., distinguished his own previous decision.

an invitee may have travelled so far outside the reasonable course of conduct as to render himself a trespasser, and thus outside the ambit of the occupier's duty of care. To put the same proposition in a different and more satisfactory way, it is necessary to consider whether the conduct of the invitee in bringing danger upon his head should reasonably have been foreseen by the occupier. "When you invite a person at your house to use the staircase you do not invite him to slide down the bannisters" (*n*), and if he does so he will not be able to recover under the Contributory Negligence Act or at all. Even if the invitee has not turned himself into a trespasser, the question whether the occupier has violated a duty of care towards the invitee must depend upon the circumstances. In some cases all that is reasonable to expect of the defendant is that he should have warned the plaintiff of the existence of the danger. Then, if the plaintiff negligently incurs the danger, the defendant will not be liable, because he will have done all that was reasonable. Sometimes, however, the likelihood of the plaintiff incurring the danger may be so great that there may be a duty on the defendant not merely to warn but to take positive steps to minimise the danger. Failure to do so will constitute negligence, which will justify the imposition of full liability on the defendant or at least an apportionment under the Act. Whether the duty is merely to warn or is to take further steps depends on all the circumstances, not merely whether the plaintiff is categorised as an invitee or licensee. For instance, if the plaintiff has to incur the danger frequently in the course of his work, the defendant as occupier (or as master) should be under a duty to minimise the danger; if the danger has only to be encountered on rare occasions, and the expense or difficulty of minimising it would be great, a mere warning may be sufficient to exculpate him. It is because the danger to be encountered in *Horton* v. *London Graving Dock Co.* was a constant and continuing one that the defendant was, it is submitted, guilty of negligence in failing to protect the plaintiff against it.

TRUSTS FOR NON-CHARITABLE PURPOSES

There is no lack of authority on the definition of charity. But in a lot of decisions, the question of whether the particular trust or gift being considered is charitable or not has exclusively occupied the attention of both the Court and counsel, with the result that it has been taken for granted that if the gift is not charitable it will be void. Very often the point is never taken, or at least not pressed, that the gift may be valid even though it is not charitable. The reader of the Law Reports must work out for himself as best he can why the trust fails as a non-charitable trust (*a*).

(*n*) *Per* Scrutton, L.J., quoted with approval by Lord Atkin in *Hillen* v. *I.C.I. (Alkali), Ltd.*, [1936] A. C. 65 at 69 (H. L.), and distinguished in *Whitehead's Case*, above.

(*a*) For example, in the recent case, *Re Hopkinson*, [1949] 1 All E. R. 346; it is not easy at a first reading to gather why the gift cannot be valid even though it is non-charitable. It certainly does not fail for perpetuity, for the capital may be disposed of at any time. It fails either for uncertainty or because there is no person as

There are several privileges—apart from income tax exemptions—which a trust enjoys if it can be found to be charitable. The most important is perhaps partial exemption from the perpetuity rule, and there is no longer much doubt about the extent to which the rules against remoteness of vesting and against inalienability, the two branches of the perpetuity rule, apply to charitable gifts. What doubt there is centres round the well-known decision in *Re Chardon*, [1928] Ch. 464. It is not the present writer's intention to deal further with the perpetuity rule. But there is another important privilege enjoyed by charity, namely, that a charitable gift will not fail for uncertainty. It is this that forms the subject of this article.

The topic is not without difficulty; much of this difficulty has arisen because argument has been concentrated on the question of charity, with the result that the further point, that the trust may perhaps be valid in spite of being non-charitable, has not been so fully argued as it might have been. The Courts have thus not often had the opportunity to examine in detail the law as to uncertainty of objects of a trust. Having found that the trust is not charitable, the Court has usually stated that the trust therefore failed for uncertainty, or for unenforceability, or because there were no beneficiaries able to seek the assistance of the Court in the enforcement of the trust. Moreover, even where the Court has expatiated on the meaning of uncertainty, the remarks of the learned Judges have, in the writer's humble opinion, revealed that there is some disagreement about the correct principle.

One view in particular which has often been put forward is that where the will or trust instrument fails to name a person (that is, a legal entity) as beneficiary, the trust fails for uncertainty. In other words, a trust for a "purpose" fails. This view was stated recently by Harman, J., in *Re Wood*, [1949] 1 All E. R. 1100 (*b*). It was originally enunciated in 1804 by Sir William Grant, M.R., in his judgment in *Morice* v. *Bishop of Durham*, in the following words :

"That it is a trust, unless it be of a charitable nature, too indefinite to be executed by this Court, has not been, and cannot be, denied. There can be no trust over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership

beneficiary in whose favour the Court could order performance. See also *Re Hummeltenberg*, [1923] 1 Ch. 237. The fact that the gift fails for perpetuity is to be gathered from a few words at the end of the judgment. *Re Nottage*, [1895] 2 Ch. 649, is an instructive case. There was a gift of an annual cup for a yacht race. At first instance the learned Judge held this to be non-charitable and void for perpetuity. The point was apparently not taken that it was also void for uncertainty and for lack of a beneficiary. In the Court of Appeal only the question of charity was taken.

(*b*) The words of the learned Judge are these : "I have heard a very interesting discussion on the question of perpetuities, but it seems to me that there is an earlier obstacle which is fatal to the validity of this bequest, namely, that a gift on trust must have a *cestui que trust*, and, there being no *cestui que trust* here, the gift cannot be good. You cannot leave it to another to make a will for you, as Lord Haldane pointed out in the House of Lords in *Houston* v. *Burns*, [1918] A. C. 342, except in the case of a gift to charity. This is not a gift to charity. You cannot simply say: 'I give part of my estate to the British Broadcasting Corporation if, and when, they decide on any Sunday during the next twenty-one years to issue an appeal on behalf of some cause or another, and I am willing to leave to them the entire discretion as to which cause it is'. There is no *cestui que trust* there, and the gift must fail on that ground". *Houston* v. *Burns* was a Scottish case. The testator left a fund to trustees with instructions to select "public, benevolent or charitable purposes". The House of Lords held that, the bequest not being charitable, the gift failed for uncertainty. It is respectfully submitted, however, that that decision turned purely on the question of uncertainty, not upon the question whether a trust fails if it lacks a person-beneficiary.

and not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favour the Court can decree performance" (*c*).

The last sentence of that passage—which is the only part of it that the writer begs to dispute—would appear to be re-echoed in the following words, taken from the judgment of Sir Wilfred Greene, M.R., in *Re Diplock* in the Court of Appeal, [1941] 1 Ch. 253, 259 :

" In order that a trust may be properly constituted, there must be a beneficiary. The beneficiary must be ascertained or must be ascertainable. In the case of what I may call impersonal trusts, such as a gift to charitable purposes, or to benevolent purposes, there is no class of beneficiary which can be defined in the same sense as a class of beneficiaries such as a class of relatives. In the latter case, although no particular person in the class may be able to say that at any given moment he is entitled to anything out of the trust, the class as a whole can enforce the trust ".

From these passages it is evident that there exists a point of view according to which a " purpose " trust, that is, a trust as to which there are no ascertainable beneficiaries, is void.

In the writer's respectful opinion, that point of view does not state the law correctly. There is no rule that requires a trust to have an ascertainable beneficiary; on the other hand, the passages quoted are not wholly incorrect. The difficulty, however, arises because two quite distinct rules are confused and stated as one. The first of these is a rule of construction, which applies to all documents, not merely to wills and trust instruments, and which gives rise to doubt only in borderline cases; as to the second, its very existence is doubtful, and even if it does exist, it is undermined by several well-established exceptions. The two rules are these :—

(1) The words of the settlor or testator must define with certainty the objects of the trust (*d*).

(2) A trust is void unless the beneficiary is a person or persons.

It is thought that it will make for clarity if these rules are kept separate, especially since the second rule is so doubtful.

Of course, a charitable trust is exempt from both rules. Indeed, one

(*c*) *Morice* v. *Bishop of Durham* (1804), 9 Ves. 399. In this case there was a bequest for " such objects of benevolence and liberality as the trustee in his own discretion shall most approve ". This was not charitable, and was therefore held void for uncertainty. The case was heard on appeal in the following year by Lord Eldon, L.C. (10 Ves. 522), who confirmed the decision of the Master of the Rolls, but made no mention of the rule that a trust requires a person-beneficiary; and, indeed, the decision is an authority for the meaning of uncertainty. The case that every trust requires a beneficiary is also argued by Gray in an article in the *Harvard Law Review* (Vol. 15, p. 509). At the same time Gray does, however, deal in detail with exceptions to the rule, including the tomb cases. But in spite of these exceptions, he supports the general rule.

(*d*) This principle is thus expressed in Halsbury, *Laws of England*, (Hailsham edition, Vol. 33, p. 101): " Except where the objects are charitable, in which case some latitude is allowed, the objects or persons to be benefited by a trust must be expressly designated, or so defined that they are capable of being ascertained. Otherwise the trust is void for uncertainty and there is a resulting trust ". This clearly visualises that the objects of a trust are not necessarily persons (unless the *or* in *objects or persons* is construed conjunctively, which seems on the face of it improbable).

reason for the confusion which has grown up is that a disposition which breaks the one rule usually breaks the other also, and, indeed, may transgress as well the rule against inalienability. There has thus been no reason for the Court to go into the question very deeply, once it has found that the disposition it is considering is not charitable.

Before discussing the second supposed rule, it must be made clear that it is doubtful whether there is any trace of it in the Reports before 1804. It is supported by the passages quoted above, as well as by a statement in the original edition of *Lewin on Trusts*, that "a trust must be for the benefit of some person or persons, and if this ingredient be wanting, as in a trust for keeping up family tombs, the trust is void". In theory, it may be argued also, a trust cannot be said to exist unless Equity will enforce it, for until Equity intervened to enforce the trust, there was no such institution; and Equity cannot enforce a trust unless there is some person who can invoke the aid of Equity by bringing an action. Without a beneficiary, there cannot by definition be a trust.

Powerful as these arguments are, it is nevertheless submitted that the arguments the other way are more compelling. It is to be noticed first that when Lord Eldon, L.C., decided *Morice* v. *Bishop of Durham*, he decided it purely by reference to the first rule of the two set out above. He made no mention of any requirement of a beneficiary (*e*). Again, the passage in *Lewin on Trusts* has been amended by editors; thus the learned editor of the 13th edition writes (p. 117):—

"A trust may take effect and be recognised by the Court, although there is no person who can, as *cestui que trust*, directly enforce the execution of it".

Underhill states a similar principle:—

"A trust to perform certain acts which are of no benefit to any human being is not enforceable unless it is a charitable trust. But it is not void unless it transgresses the rule against perpetuities, or is contrary to public policy; and the trustee may therefore perform it as he wishes".

Authority for these statements may be found in a line of "tomb" cases, in which it has been held that a gift to trustees to build a tomb is valid; and so is a gift of income to maintain a tomb, provided of course that the perpetuity period is not exceeded (*f*). Now it may be

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(*e*) (1805), 10 Ves. 522. That decision should be viewed in the light of the remarks of Lord Davey in *Hunter* v. *Att.-Gen.*, [1899] A. C. 309, 323, where it is made quite clear that the reason why the trusts failed in that case was uncertainty.

(*f*) The earliest decision in which a gift to build a tomb was upheld seems to be *Masters* v. *Masters* (1718), 1 P. Wms. 421. In that case there was a legacy of £200 to build a tomb for the testator's mother. This was held valid. Other cases are *Mellick* v. *The President and Guardians of the Asylum* (1821), Jac. 180; *Adnam* v. *Cole* (1843), 6 Beavan 353, 357; *Hunter* v. *Bullock* (1869), 14 Eq. 45; *Trimmer* v. *Danby* (1856), 25 L. J. Ch. 424 (here the testator left a sum of money to be expended in raising a monument to himself in St. Paul's Cathedral. This was a valid trust, although it was not, as far as can be gathered from the reports, held to be charitable); *Musset* v. *Bingle*, [1876] W. N. 170 (£300 to erect a tomb to the memory of the first husband of the testator's wife); *Mitford* v. *Reynolds* (1848), 16 Simons 105 (gift of money to trustees, to buy a piece of land and to erect thereon a monument to the family dead; this was in itself valid, but failed because the owner of the piece of land specified refused to sell it to the trustees); *Pirbright* v. *Salway*, [1896] W. N. 86 (£800 left to the vicar and churchwardens of a certain parish, to apply the income "so long as the law for the time being permitted", in the upkeep of a certain grave. Valid); *Re Hooper*, [1932] 1 Ch. 31 (a gift of income to maintain some graves, a vault and a monument for as long as the

objected that these cases amount to nothing more than funeral expenses, and that a testator has always been able to provide for his own funeral, quite apart from the law of trusts. But the decided cases go much further than mere funeral expenses (*g*). They include trusts not merely for tombs but for monuments, and even for the tombs of other persons than the testator; that is certainly no funeral expense. One decision of particular interest is that of Joyce, J., in *Re Moore*, [1901] 1 Ch. 936. There a testatrix had bequeathed £500 to trustees upon trust to apply the income to keep in repair her brother's tomb in Africa, " for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death ". The learned Judge held this to be void for uncertainty, the period being unascertainable. No objection whatever was made to the fact that there was no beneficiary to the trust. A rather similar line of cases deals with trusts for animals, which have been upheld by the Court. Of these the best known is *Re Dean* (1889), 41 Ch. D. 552, in which a testator had left a large income to trustees on trust to apply it to maintain his horses and hounds and their stables, kennels and buildings for a period of fifty years. North, J., rejected the idea that a trust without a beneficiary was void and refused to accept the statement from Lewin, which is set out above, as being the law (*h*). Again, in *Re Thompson*, [1934] Ch. 342, a testator had left a gift of £1,000 to a trustee, to be applied in such manner as he

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trustees could legally do so. This was valid for a period of twenty-one years). Of course, a trust to maintain a tomb which offends the perpetuity rule by making the property inalienable beyond the perpetuity period, will be void: *Lloyd* v. *Lloyd* (1852), 2 Simons (N.S.) 255, 264. On the other hand, a trust to build a tomb does not offend the perpetuity rule, for the capital of the fund may be laid out within a very short time.

(*g*) And moreover, funeral expenses take priority of creditors. It has never even been suggested that a testator can prefer the glory of his own memory to the payment of his debts.

(*h*) It was in this case that counsel called in aid the passage from Lewin: " A trust must be for the benefit of some person or persons, and if this ingredient be wanting, as in a trust for keeping up family tombs, the trust is void ". But North, J., disapproved that statement and gave his views in the following words: " Then it is said, that there is no *cestui que trust* who can enforce the trust, and that the Court will not recognise the trust unless it is capable of being enforced by someone. I do not assent to that view. There is not the least doubt that a man may, if he pleases, give a legacy to trustees upon trust to apply it in erecting a monument to himself, either in a church or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid, although it is difficult to see who may be the *cestui que trust* of the monument. In the same way I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it to the repair of such a monument. . . . But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same to keeping that monument in repair, say for ten years, is, in my opinion, a perfectly good trust, although I do not see who could ask the Court to enforce it ". The actual decision would hardly be followed today, since the testator had expressed the income to be payable for a period of fifty years. The modern view seems to be that the longest period during which property may be tied up so as to be inalienable is the normal perpetuity period. The testator should therefore either have stated a period of twenty-one years, or should have set out a number of actual lives in being, and expressed the income to be payable for a period of twenty-one years after the last death. It is to be noted both of this case and of *Re Thompson*, that neither is simply a trust for the upkeep of animals alone. *Re Dean* clearly allows the trustees to spend the money on maintaining the stables as well as the animals. *Re Thompson*, goes even further; it is not really a trust for animals at all, for fox hunting may be furthered in many other ways than by paying for upkeep of horses and hounds. Presumably the trustees of such a trust would be entitled to spend the money in buying pink coats or even in financing a Hunt Ball, if they believe *bona fide* that such things have the effect of promoting fox hunting. Another animal case is *Pettingall* v. *Pettingall* (1842), 11 L. J. Ch. 167. See too *Re Kelly*, [1932] Ir. R. 255.

should in his absolute discretion think fit towards the promotion and furthering of fox hunting. "In my judgment", said Clauson, J., "the object of the gift has been defined with sufficient clearness, and is of a nature to which effect may be given".

Both the tomb cases and the animal cases have been acted upon so long that it is extremely unlikely that they will ever be overruled. Here then is a line of valid "purpose" trusts. It may be objected that they are simply two small exceptions which do not undermine the rule. But the fact is, there are many other kinds of trust in which although there is a human beneficiary, there is still nobody who can enforce the trust, that is, nobody who can invoke the aid of the Court if the trustees fail to pay the income to him. A discretionary trust, for example, is none the less valid although the beneficiary cannot complain if the trustees exercise their discretion so as to give him nothing at all. Again, is not a "maintenance and advancement clause" in a trust for an infant beneficiary simply a "purpose" trust? For the trustees pay away the income, not with reference to the identity of the recipient, but with reference to a purpose, that is, the infant's maintenance. The payments are not made to the infant directly any more than the payments in tomb cases are made to the tomb. If, therefore, we still wish to assert that a trust is void that lacks a beneficiary, and that a trust for a defined purpose is not a trust, we are obliged to admit these broad exceptions by which the trustees pay away the trust money by reference to a purpose which the payments further, and not by reference to the identity of the recipient. It is only a short step to admitting that the exceptions have swept away the rule. We may be the more persuaded to take this step if we consider a few cases dealing with trusts in favour of unincorporated bodies. Such trusts have been held to be valid provided the rule against inalienability has been observed. For example, in *Re Turkington*, [1937] 4 All E. R. 501, there was a gift to trustees on certain trusts, which included the following:

"... to the Staffordshire Masonic lodge No. 726, as a fund to build a suitable temple in Stafford."

The lodge was, of course, an unincorporated association. The trust was held to be valid, although it was not strictly speaking a trust in favour of the members of the lodge beneficially, but was in effect a "purpose" trust, the purpose being to build the temple. In an earlier case it was decided that a gift in the following terms was valid:

"I bequeath to the committee for the time being of the Corps of Commissionaires in London, to aid in the purchase of their barracks, or in any other way beneficial to that corps" (*i*).

Surely both these trusts were trusts in which the beneficial objects

(*i*) *Re Clarke*, [1901] 2 Ch. 110. Other decisions on gifts to unincorporated bodies include: *Re Drummond*, [1914] 2 Ch. 90; *Re Taylor*, [1940] Ch. 481; *Re Ogden*, [1933] Ch. 678; *Re Price*, [1943] Ch. 464; *Re Prevost*, [1930] 2 Ch. 383; *Re Delany's Estate*, L. R. 9 Ir. 226; *Cocks* v. *Manners*, L. R. 12 Eq. 374. A gift to an association beneficially and without further words seems to be as a rule valid. It is interpreted as a gift to the members for the time being. But such a gift may fail if the membership of the association is not definitely ascertainable; or if the gift is directed to be retained by the trustees indefinitely. But the two decisions discussed in the text clearly show, it is submitted, that a gift to an association, to be applied to the purposes of that association, may be valid, even though there is no beneficiary who can invoke the assistance of the Court if the purpose is not carried out.

were purposes. The rules as to certainty and perpetuity were observed: therefore the trusts were valid, even though there was no person or persons named as beneficiaries (*k*).

Thus, in view of the authorities, the writer believes it safe to assert that the "purpose" trust is established as a valid, though not directly enforceable, trust. It is not confined to tombs and horses. Against the theoretical objection, that a trust which is unenforceable by definition lacks the essential quality of the trust-concept, it may be argued first, that Equity has developed, so that what may have been true in the time of Sir William Grant, M.R., may now have become untrue, and second, that there is no fixed dividing line between trust and power, and that these "purpose" trusts are in effect analogous to general powers of appointment; the trustees may pay the fund to anybody, provided the payment furthers the settlor's purpose; if he fails to exercise the general power, there is an implied trust in favour of the settlor himself (*l*).

Mention was made earlier of the numerous cases in which the argument turned on the question of charity, and in which it was decided that the trust was not charitable, and was therefore void. There is no space here to review the decisions in order to find out which were held void for uncertainty, which for perpetuity, and which, if any, were held void for lack of a beneficiary (*m*). That would be

(*k*) Although a purpose trust may not be directly enforceable, in the sense intended by the learned Master of the Rolls in *Morice* v. *Bishop of Durham*, it must not be forgotten that it will normally be indirectly enforceable, since if the purpose is not in fact carried out, a resulting trust will arise.

(*l*) One interesting decision which illustrates how uncertain is the dividing line between general powers of appointment and discretionary trusts or purpose trusts is *Re Park*, [1932] 1 Ch. 580. A testator left residue to trustees upon trust to pay the income "to such person (other than herself) or persons or charitable institution or institutions in such shares and proportions" as X should from time to time during her lifetime direct in writing. There was a gift over after the death of X. This was held to be a valid power. See too *Drake* v. *Att.-Gen.* (1843), 10 Cl. & F. 257; *Re Byron*, [1891] 3 Ch. 474.

(*m*) It is worth while pointing out that the proposition that the "purpose" trust is an established institution, and not confined to one or two exceptionable types of case, receives indirect support from a few decisions in which "purpose" trusts have been held void for perpetuity. For why go to the bother of examining the perpetuity question at all, if the trust is void in any case? For example, *Re Nottage* was a case of a "purpose" trust (see note (*a*), supra). But the learned Judge held it void for perpetuity, and thus leaves us to assume that it was probably not void on any other ground. So, in *Re Drummond*, [1914] 2 Ch. 90, there was a gift of income to provide an annual outing for certain workers. This was held not to be charitable. Therefore it failed for perpetuity. No mention was made of any rule that it would fail because there was no ascertained beneficiary who could enforce it. As regards the rule that a gift which makes property inalienable for a long period is void for perpetuity, the authorities are reviewed in an article by W. O. Hart in 53 L. Q. R. 24. Generally, a trust will not be considered inalienable if the trustees are able to dispose of the capital whenever they wish. But where they are bound to retain the capital, and apply only the income to the beneficial purposes, then, unless the trust is confined to the perpetuity period, it will be void of perpetuity. The authorities deal mostly with gifts for the maintenance of tombs (see note (*f*), *supra*), or with gifts to unincorporated bodies. Of the latter the most important decisions appear to be the following: *Thomson* v. *Shakespear* (1860), 1 De G. F. & J. 399 (C. A. in Ch.); *Carne* v. *Long* (1860), 2 De G. F. & J. 75 (L. C. on Appeal) (this was a devise of land to a voluntary association, a club library at Penzance. There was nothing in the disposition to prevent the trustees disposing of the land or spending the proceeds whenever they thought fit. But one of the rules of the library did, in fact, forbid this. It was accordingly held that there was a perpetuity. But the present writer would prefer not to rely on this decision; for the point was apparently overlooked, that the members also had power to change any of the rules at the annual meeting. There was nothing to prevent them changing the rule which forbade them to dispose of capital); *Cocks* v. *Manners*, L. R. 12 Eq. 574.

no small task. Suffice it for the time being to state that it is desirable to bear in mind that here is an argument worth pressing in those cases where the testator has made his meaning perfectly clear, but has named no person to be beneficiary, and has not framed the gift so as to be charitable.

D. C. Potter.

A NOTE ON THE TRUST FOR SALE RESTRICTION

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It is the aim of this note to show that the requirement of two trustees or a trust corporation to receive purchase money is as general in the case of registered land as in that of unregistered land held on trust for sale. This is contrary to the view of a learned writer expressed *ante*, Vol. 11, p. 89.

By section 95 of the Land Registration Act, 1925, " the statutory restrictions affecting the number of persons entitled to hold land on trust for sale and the number of trustees of a settlement apply to registered land ". Dr. Potter in his *Conveyancing under the Land Registration Act, 1925* (1934), p. 206, states that the section appears to affect only the largest and not the smallest number of trustees and he deems the section " very ill conceived " because of the supposed doubt which it raises. Mr. W. J. L. Ambrose, too, (*ante*, Vol. 11, p. 90) remarks that the word " restriction " suggests that the section is dealing with the maximum of four rather than the minimum of two. Brickdale (4th ed. (1939), p. 237) raises no query in commenting on section 95, noting not only the maximum number able to hold on trust for sale but also the minimum number of trustees able to give a valid receipt under section 27 (2) of the Law of Property Act, 1925 (as amended by the Law of Property (Amendment) Act, 1926, Sched.). Dr. Potter, after referring to section 58 (3) of the Land Registration Act, 1925, concludes that " despite the inelegance of this legislation the Court would follow the law applicable to unregistered conveyancing ".

Admittedly the wording of section 95 is fairly open to criticism. As Dr. Potter points out (p. 206), one trustee may *hold* on trust for sale. But since the requirement of a minimum number to give a valid receipt as trustees for sale is a restraint on the *exercise* of the trust for sale, the writer of this note submits that it is a statutory restriction which " affects " the number of persons entitled to hold land on trust for sale.

A decision that section 95 does not refer to the two trustees requirement would leave the guarantee wholly dependent on section 58 (3) and Rule 213 of the Land Registration Rules, 1925, *i.e.*, only in the case expressly provided for by that subsection would the safeguard be obligatory—assuming that section 27 (2) of the Law of Property Act, 1925, could not be interpreted so as to apply of its own force to registered land.

The writer of this note submits that " restrictions " in section 95 is exactly equivalent to " limits ", and that the use of the plural clearly

points not only to the upper limit on the number able to hold on trust for sale but also to the rule requiring a receipt for purchase money to be given by two trustees or a trust corporation : and further that no omission in section 58 (3) or in the related Rules can override or modify the paramount principle expressed by section 95.

Section 95, however, can impose this requirement effectively only subject to the necessary protective entry being made on the register. The power to place restrictions on the register is regulated by section 58. Subsection (1) enables the proprietor to apply for entry of a suitable restriction. Subsection (2) directs the Registrar to make the entry when satisfied of the applicant's right, subject to payment of fees and to his power of refusing an unreasonable or inconvenient restriction. The case of joint proprietors is dealt with by subsection (3) : " In the case of joint proprietors the restriction may be to the effect that when the number of proprietors is reduced below a certain specified number no disposition shall be registered except under an order of the court, or of the Registrar after inquiry into title, subject to appeal to the court, and, subject to general rules, such an entry under this subsection as may be prescribed shall be obligatory unless it is shown to the Registrar's satisfaction that the joint proprietors are entitled for their own benefit, or can give valid receipts for capital money, or that one of them is a trust corporation ". The subsection is implemented by Rule 213 : (1) " An entry under subsection (3) of section 58 . . . shall be in Form 62, and need only be made where, by law the survivor of the joint proprietors will not have power to give a valid receipt for capital on a disposition of the land or charge, or where the Registrar, for any special reason, considers that such an entry would be desirable. (2) Such an entry may at any time be made with the consent of joint proprietors entitled in their own right. (3) No entry shall be made under this Rule where the prescribed restrictions, applicable to settled land, are entered on the register ".

Form 62 is headed " Entry restraining a disposition by a sole surviving proprietor ". It runs : " When the number of joint proprietors has been reduced to one, unless such proprietor is a trust corporation, no registered disposition of the land [*or* charge] shall be made except under an order of the Registrar, after an inquiry into title, or an order of the Court ".

Mr. Ambrose has pointed out (*ante*, Vol. 11, p. 89) that section 58 (3) and Rule 213 curiously enough refer only to " joint proprietors " and " the survivor of joint proprietors ". According to him " the result is that if a sole trustee buys or otherwise acquires registered land, he is neither ' joint proprietors ' nor ' the survivor of joint proprietors ' and no compulsory restriction is prescribed, and, unless he applies for the entry of such a restriction, he will be able to sell the land without anyone else's concurrence ".

A sole proprietor holding on trust for sale may be, *e.g.*, a trustee of pure personalty who has bought land in breach of trust : or a trust for sale may have been constituted with only one trustee : or he may have been a personal representative who has assented to the vesting in himself alone of a devise on trust for sale.

At first glance it might appear that a restriction in Form 10 would meet the case. Form 10 is headed " Restriction where Statutory

owners or trustees holding on trust for sale are entered as proprietors". It runs: "Except under an Order of the Registrar, no disposition is to be registered unless authorised by the Settled Land Act, 1925, and except where the sole proprietor is a trust corporation, no disposition under which capital money arises is to be registered unless the money is paid to at least two proprietors". But Rule 58 which provides this Form is set in a group of Rules which have to do exclusively with settled land. The marginal note to Rule 58 is: "Forms of restrictions applicable to settled land"; marginal notes, however, cannot affect the construction of the Rules (Rule 1 (6)). Unless the context otherwise requires "capital money" has the same meaning as in the Settled Land Act, 1925 (Land Registration Act, 1925, s. 3 (xxvi)); and by Rule 1 (1) words or expressions defined in the Act have the same meaning in the Rules. It must be concluded that Brickdale is correct in remarking that the reference to a trust for sale is an error, Form 10 being confined to settled land (p. 474, note (*h*)).

Hence, so far as the Rules and special Forms extend, the case of land held by a sole trustee for sale who is not a survivor or a trust corporation is a *casus omissus*. It is submitted that the wording of section 58 (3), Rule 213 and Form 62 which gives this result is either inadvertent or deliberately provides only for the obvious case where a trust for sale has been properly constituted with the due complement of trustees. Brickdale nowhere refers to the omission which that work might be expected to do if any meaning lay behind it.

In discussing Form 62 Brickdale comments (p. 488, note (*o*)) that normally a more convenient Form is used in practice: "No disposition by one proprietor of the land (being the survivor of joint proprietors and not being a trust corporation) under which capital money arises is to be registered except under an order of the Registrar or of the Court". And it is observed that "this restriction is suitable in the case of trustees for sale and permits a surviving trustee to transfer to new trustees or to a beneficiary without official interference just as if the land were unregistered". The substituted formula equally with Form 62 excludes the case of the sole trustee for sale who is not a survivor.

It could doubtless be argued that section 95 is qualified by section 58 (3), Rule 213 and Form 62. By the Land Registration Act, 1925, s. 144 (2), Rules made in pursuance of the section shall be of the same force as if enacted in the Act. With regard to section 58 (3) it might be said *expressum facit cessare tacitum*—that because a restriction is expressly appointed for joint proprietors or the survivor of joint proprietors and the odd case of the sole trustee for sale who is neither a trust corporation nor a survivor is left out, then by implication a restriction is not called for in his case. The writer of this note submits that the argument is fallacious, there being nothing ambiguous in section 95 which expresses a paramount and rigid rule in terms which give no room for an unprincipled exception. Section 58 (3), Rule 213 and Form 62 have for their common starting-point an assumption of joint proprietorship: for this reason they simply fail to cover the field measured out by section 95. Section 58 (3) should be interpreted so as to be consonant with section 95 and this can be done by treating it as a provision made for the ordinary and obvious case

and not as tacitly dispensing with the safeguard in all other cases in the teeth of section 95.

Of course it is the actual entry of a restriction (or application therefor) which *obliges* the Registrar to act—not his mere knowledge of the existence of a case for a compulsory restriction. This is obvious from a consideration both of the general principle laid down by section 74 that the Registrar shall not be affected with notice of a trust express implied or constructive, and of Rule 214 which declares that "when such an entry has been made" (*i.e.*, an entry under Rule 213), the Registrar shall before entering a disposition by one proprietor require production of the equitable title.

The Registrar has a wide discretion under Rule 78 to refuse registration of any instrument or entry which appears to him "improper in form or in substance" (*etc.*). Still, the impropriety may not appear, the more so as no provision is made for filing trust instruments analogous to that made for filing settlements under section 88 and Rule 59.

A purchaser also is exonerated from concern with any trust by section 74 and so, it seems, there being no restriction on the register, could not insist on the appointment and concurrence of a co-trustee as a condition of completion.

It is submitted that there is nothing in the nature of registered land to justify giving the two trustees safeguard a narrower application than where land is unregistered. The fact that there are several types of sole fiduciary owner able to give a receipt for purchase money (see *ante*, Vol. 11, pp. 88, 89) is no ground for an interpretation which would extend this exempt class, especially in a period of lowered moral standards. There seems to be as much force now as there was in 1925 in Wolstenholme & Cherry's comment (11th ed., Vol. 1, p. 180): "the safeguard against mistake or fraud of having at least two trustees or a trust corporation . . . where capital money falls to be received is a fairly obvious reform; it became essential when additional powers . . . to overreach equitable interests were conferred".

The writer of this note does not claim that a sole trustee who is not a survivor is under a legal or equitable duty to apply for a restriction. He may at any time comply with section 95 by appointing a co-trustee who becomes registered. The Court, however, may hold that before this step is taken he is as a matter of law under a duty to apply for a restriction, so that in the event of his death without the appointment of a co-trustee having been made, his failure to apply may lead to demands against his estate for breach of trust if it has facilitated fraud or neglect by his personal representative.

A beneficiary becoming aware of a single trustee situation should protect his interest by using the power conferred by section 58 (5), enabling application for entry of restrictions by persons other than proprietors. By Rule 236 the application is to be in Form 75 modified to meet the circumstances, setting out the grounds and accompanied by such evidence as the Registrar directs. The form of restriction would be adapted under the general power to adapt forms given by Rule 74. The ordinary form of restriction commended by Brickdale (*supra*) could be used omitting the words in brackets. Alternatively

the beneficiary could enter a caution but should not use so strong a measure save in an urgent or suspicious case.

To sum up, it is submitted that—

1. Section 95 refers not only to the maximum number of co-proprietors but also imposes the two trustees rule for the purpose of receiving purchase money in precisely the same cases where the rule affects unregistered land.

2. The requirement is imperfectly implemented by the special provisions (section 58 (3), Rule 213, Form 62) because of their express hypothesis of a plurality of co-owners at the time when the restriction is applied for, the case of the sole trustee for sale who is not a survivor of co-trustees being left without special provision.

3. Effect ought to be given to the principle of section 95 by the use of an adapted restriction applied for by the sole trustee under section 58 (1) or by a beneficiary under section 58 (5).

4. Reliance should not be placed on the possibility of objection being made by the Registrar to a proposed registration on a sale by a sole trustee for sale because

(a) The vendor's fiduciary character as a sole trustee holding on trust for sale may not be apparent.

(b) Section 74 relieves the Registrar from concern with any trust.

(c) If the vendor's character as a sole trustee holding on trust for sale does appear it is not at all certain that the Registrar would invoke Rule 78 and refuse registration of the transfer: at least one former Registrar (*ante*, Vol. 11, pp. 89, 90) clearly held the minimum number rule to be inoperative outside the express terms of section 58 (3) and Rule 213.

TRUSTS FOR SALE OF LAND*

Trusts for sale of land have a history of respectable antiquity and the longevity of a legal conception is usually one of its merits because it means that the conception has undergone a long process of judicial exposition, analysis and refinement so that its features emerge as clear and distinct as the features in a portrait by some old master of a type which would not attract the disapproval of Sir Alfred Munnings. Of the two methods of creating a trust for sale, by will and by conveyance, the testamentary trust for sale is the older and its progenitor is to be found in medieval times in directions contained in wills to sell land and to apply the proceeds for charitable purposes.

The earliest of such wills which I have discovered is that of Thomas Sampson of Bristol (where there was a customary power to devise land by will). By his will made in 1387 he directed his executors to sell his freehold dwelling-house by the advice of the Mayor (who was to have 20s. for his pains) and to distribute the money among the poor, feeble and lame, and in the marriage of poor maidens (*a*).

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* Being a public lecture delivered to the Faculty of Laws, University of London.

(*a*) *The Great Red Book of Bristol* (Bristol Record Society), vol. ii, p. 60.

In the volume of the Surtees Society entitled *North County Wills* (*b*) we may read the will of Robert Manfield, Provost of Beverley, who, in 1419, having taken the previous precaution of making a grant to feoffees to uses, willed that his feoffees should sell his land at Sermoneres Lane, London, and distribute the proceeds amongst certain charities; similar directions are found in other wills in the fifteenth century.

Two centuries later we find testamentary trusts for sale applied for the purpose of distributing the proceeds not only amongst charities but for a variety of purposes, *e.g.*, Sir William Holdsworth in his *History of English Law* cites the will of John Hampden directing the proceeds of sale of certain land to be applied for a portion. To these testamentary trusts for sale the Court of Chancery applied the doctrine of conversion. If there was a trust for sale or a direction to sell land, equity would regard that land in the light of money from the moment when the instrument creating the trust took effect. Apparently the first important case in which the doctrine of conversion was definitely applied was *Lingen* v. *Sowray* in 1715, though that was the converse case—where money was directed to be laid out in the purchase of land. The best enunciation of the doctrine in the earlier cases is to be found in *Fletcher* v. *Ashburner* in 1779, and *Ackroyd* v. *Smithson* in 1780. But, as the late Mr. J. M. Lightwood pointed out in one of his illuminating articles (*c*), the origin of the conveyance on trust for sale is more difficult to trace. He points out that conveyances on trust for sale do not appear in precedent books till the nineteenth century. He did not, of course, mean to imply that such conveyances were not known before that date. I have found a number of eighteenth century cases which were concerned with conveyances on trusts for sale, the earliest being the case of *Emblyn* v. *Freeman* (*d*) in 1720 which was concerned with a lease and release on trust for sale dated April 20, 1713. But my research has been by no means exhaustive and there may well be earlier examples. However, as Mr. Lightwood pointed out in his article, conveyances on trust for sale do not appear in conveyancing precedents until the nineteenth century. In *Barton's Conveyancing*, published in 1811, there is a precedent of a trust for sale with a separate deed declaring the trusts of the proceeds of sale, but this was solely for the purpose of a creditor's deed. It was some thirty years later before precedent books set out the form of a marriage settlement of land by way of trust for sale, the proceeds of sale being declared by a separate deed, *e.g.*, in *Martin's Precedents of Conveyancing*, published in 1840. The effect of this device was, of course, that a purchaser buying from the trustees for sale would examine the conveyance on trust for sale which would show that there were certain trusts, but the Courts would exempt him from the obligation of investigating the deed declaring the trusts of the proceeds of sale. On payment of the purchase money he would be a *bona fide* purchaser for value of the legal estate without notice and he was under no obligation to see or inquire as to the application of the purchase money by the trustees. Needless to say,

(*b*) At p. 22.
(*c*) (1927), *Cambridge Law Journal*, vol. iii, p. 63.
(*d*) *Precedents in Chancery*, p. 542.

the Courts applied the doctrine of conversion to conveyances on trust for sale of land as they had applied them in the case of wills (*e*).

But there was, prior to 1926, no clear separation of trusts for sale from settlements of land in specie. In fact, section 63 of the Settled Land Act, 1882, expressly provided that any land which was subject to a trust or direction for sale and for the application of the income for the benefit of any person for his life or any other limited period should be deemed to be settled land; and the instrument or instruments under which the trust arose should be deemed to be a settlement and the person for the time being beneficially entitled to the income of the land until sale should be deemed to be tenant for life thereof. But by section 7 of the Act of 1884 a sale under section 63 was not to be carried out without leave of the Court.

The property legislation of 1925 has effected two major changes in the law relating to trusts for sale; first, of course, by creating statutory trusts for sale where an owner of realty and personalty dies intestate, where a legal estate not being settled land is limited to persons jointly and beneficially and where land is limited to persons as tenants in common and in other cases.

The second change is in the sharp line of demarcation drawn between land held on trust for sale and land settled in specie. To make sure that the Law of Property Act, 1925, and S. L. Act, 1925, had, in fact, effected this demarcation the Law of Property (Amendment) Act, 1926, added a new subsection to section 1 of the S. L. Act providing that that section should not apply to land held upon trust for sale. Whether such demarcation is either desirable or necessary is open to argument. It might be argued that the elaborate machinery of the Settled Land Act is really a relic of a bygone age when a great deal of the land in England was held in large estates in strict settlement. To such estates the machinery of Vesting Instruments, Deeds of Declaration, special grants of probate or letters of administration limited to settled land and Deeds of Discharge might be appropriate. But, for good or for ill, large estates are now being broken up and strict settlements are becoming more and more rare. The typical settlor today is the small man who makes a will, often without legal advice, in which he leaves his house or cottage to his wife for life and he would be horrified if he realised what strange and terrifying legal phenomena he has thereby brought into being.

In my younger days I suggested, in *The Law Quarterly Review* (*f*), two possible changes; the first and more drastic one was that a bold Parliament might repeal altogether the Settled Land Act and enact that all settlements should be by means of a trust for sale. Alternatively and less drastically, I suggested that the Settled Land Act might be amended so as to provide that the legal estate in settled land should be vested in the trustees of the settlement and not in the tenant for life while leaving with the tenant for life the initiative in respect of selling, leasing, exchanging and otherwise managing the settled land. I shall not weary you by elaborating these proposals nor in discussing their merits or demerits, because I stand before you today, not as a

(*e*) See, for example, *Clark* v. *Franklin* (1858), 4 K. & J. 257.
(*f*) Vol. xli, pp. 580–582.

modern Bentham, but in the humbler role of a commentator. And I invite you to consider the position arising under a trust for sale in the modern law. The statutory definition of a trust for sale is contained in section 205 of the Law of Property Act, where it is defined as meaning " an immediate binding trust for sale whether or not exercisable at the request or with the consent of any person and with or without a power at discretion to postpone the sale ". The difficulties arising from this definition, which Dr. Hanbury has rightly described as clumsy because it includes the thing to be defined, are now familiar history. They have been discussed at length in *Re Leigh's Settled Estates* (*No.* 1) (*g*), *Re Ryder and Steadman's Contract* (*h*), *Re Parker's Settled Estate* (*i*), *Re Norton* (*k*) and *Re Sharpe's Deed of Release* (*l*) and the result seems to be :—

(i) that if Tomlin, J., as he then was, meant to decide in *Re Leigh's Settled Estates* (*No.* 1) that no land can ever be subject to a binding trust for sale unless the trustees have power to overreach prior equitable interests, most of the other Judges who have judicially considered the point have been unable to agree with him;

(ii) if land is limited on trust for sale subject to prior equitable interests which, but for the existence of the trust for sale, would make the land settled land, then the land is settled land and the title must be made under the S. L. Act unless either the trustees for sale are approved or appointed by the Court or the trust for sale is a statutory one. The authority for this second qualification is, of course, *Re Ryder and Steadman's Contract* (*m*), where it was held that three vendors to whom, before 1926, land had been conveyed as tenants in common in fee simple subject to, but with the benefit of an indemnity against a jointure rentcharge charged thereon, could, as trustees for sale, convey the land subject to but with the benefit of the indemnity against the rentcharge.

I mention *Re Ryder and Steadman's Contract* (*m*) in particular because it brings out the main theme of this lecture, namely, a comparison between express and statutory trusts, both as regards the exercise of powers by the trustees and also, as regards the position of the beneficiaries.

1. *Powers of Trustees for Sale.*

Section 28 (1) of the Law of Property Act, 1925, provides in effect that trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, and all land acquired under the subsection shall be conveyed to the trustees upon trust for sale. They may, therefore, sell either in consideration of a capital sum or in consideration of a rentcharge, terminable or

(*g*) [1926] Ch. 852.
(*h*) [1927] 2 Ch. 62.
(*i*) [1928] Ch. 247.
(*k*) [1929] 1 Ch. 84.
(*l*) [1939] Ch. 51.
(*m*) [1927] 2 Ch. 62.

perpetual, and they may exercise the powers of leasing and accepting surrenders of leasing conferred by the Settled Land Act on a tenant for life, and may mortgage for all purposes for which a tenant for life may mortgage, and, with all deference to Mr. Justice Vaisey, they may at their discretion exchange the land for other land. But what is their position as regards the application of the proceeds of sale?

In *Re Wellsted's Will Trusts* (*n*) there was a trust for sale under a will. The trustees had sold part of the land and held the proceeds of sale awaiting investment. It was proposed to sell further realty, to realise some of the securities representing the proceeds of earlier sale of realty and to apply these sums together with the money in hand in the purchase of realty. Of course, amongst the purposes for which capital money arising under the Settled Land Act may be applied under section 73 of the Act is " in purchase of land in fee simple or of leasehold land held for 60 years or more unexpired at the time of purchase ". Vaisey, J., however, held that the trustees had no power to purchase land as an investment because, after referring to the powers conferred upon a tenant for life by the Settled Land Act, it seemed to him that all these powers were given to persons for the time being holding land upon trust for sale in order to be exercised in relation to such unsold land and not otherwise.

He said :—

> " That the section contemplates that land may be acquired under its provisions is plain from its wording. I do not doubt that such acquisition might be by way of exchange or by purchase but in my view acquisition of land AS AN INVESTMENT is outside the authority which the section confers. If land is required for the preservation or protection of the unsold land, or for its improvement the case is, to my mind, wholly different. . . . I cannot believe that it permits an estate in Devonshire to be exchanged for a house in London any more than it permits such an estate to be sold and the proceeds applied in the purchase of a house."

However, the Court of Appeal thought otherwise (*o*) and reversed the decision of Vaisey, J. As the Master of the Rolls said (*p*) :—

> " The powers given by the opening of section 28 (1) include the powers of application and choice of application which are conferred by section 73 of the Settled Land Act, 1925 ; the word ' all ' when applied to these powers means ' all ' and there is no context sufficient to cut it down so as to exclude certain of these powers. . . ."

Cohen, L.J., in agreeing with the Master of the Rolls, added (*q*) :—

> " I should be reluctant to be driven to the other conclusion, if only for the reason that if we are to accept the learned Judge's judgment, as it seems to me, it would leave the legitimacy of the transaction to depend not on the transaction itself but on the state of mind of the trustees who were effecting it, a situation which I should be very loth to believe was the intention of the Legislature."

(*n*) [1948] Ch. 610.
(*o*) [1949] 1 All E. R. 577.
(*p*) *Supra*, at p. 583.
(*q*) *Supra*, at p. 587–588.

The decision of the Court of Appeal has brought relief to many lawyers, at least in the West of England, because the bulk of freehold land in Bristol and Bath is subject to perpetual yearly rentcharges. In spite of the fact that so learned a property lawyer as Professor Cheshire (*r*) stigmatises a grant in fee simple in consideration of a perpetual rentcharge as an undesirable form of conveyance, it is regularly employed in the West, even though the practice is elsewhere apparently regarded as slightly lacking in respectability. I observe, for example, that candidates for the Law Tripos at Cambridge are warned that they may expect no questions involving a rentcharge. However, in the West not only are these rentcharges regularly being created, but they are regarded as a desirable form of investment and in many instances the trustees for sale of land have been advised by their solicitors that they may properly apply the proceeds of any sale in the purchase of perpetual rentcharges, since they come within the definition of land in section 73 of Settled Land Act. Hence their relief at the decision of the Court of Appeal.

But before *Re Wellsted's Will Trusts*, there was the case of *Re Wakeman* (*s*) in which the late Lord Uthwatt (then Mr. Justice Uthwatt), whose recent death we all deplore, held that once trustees for sale of land had sold all the land held upon trust for sale they no longer had any power to purchase land. This case was not referred to by the Master of the Rolls or Somervell, L.J., in *Re Wellsted's Will Trusts* and Cohen, L.J., who mentioned it, said that he desired to reserve the question, what the position would be if at the time when the question of investment arose no land was held on the trusts of the settlement.

With all deference one would hope that *Re Wakeman* will in due course be overruled, otherwise the extraordinary position arises that trustees for sale who desire to retain their power to invest land must retain a piece of land however small, in order to be able to exercise their power to invest in land.

There remains the case of *Re Power's Will Trust* (*t*), where a testator empowered his trustee (the Public Trustee) to invest all moneys required to be invested under the will in any manner in which he might in his absolute discretion think fit in all respects as if he were the sole beneficial owner of such moneys including the purchase of freehold property in England and Wales, and Jenkins J., held that on the true construction of the will the trustee was not empowered to purchase a freehold house as a home for the widow and children because he was authorised to purchase freehold property only as an investment and the purchase of a house with vacant possession to permit someone to occupy it was not a purchase by way of investment.

Of course, in the case of express trusts the settlor may overcome the effect of the decisions in *Re Wakeman* and *Re Power's Will Trust* by appropriate provisions in the settlement or will, as the case may be, but so far as a statutory trust for sale is concerned, these two cases must obviously be borne in mind by the trustees and if it is desired, for example, to purchase a house as a residence for a beneficiary, then, unless all the beneficiaries are ascertained and *sui juris* and consent, the

(*r*) *Cheshire's Modern Real Property*, 5th ed., p. 324.
(*s*) [1945] Ch. 177.
(*t*) [1947] 2 All E. R. 282.

only safe course is to apply to the Court under section 57 of the Trustee Act, to authorise the transaction.

Now let us turn to the actual exercise of their powers by trustees for sale, and here I suggest that there are four main points of difference between express and statutory trusts and four main points of likeness :—

As to Points of Difference.

In the first place statutory trustees can only exercise those powers conferred on them by section 28 (1) except that by section 7 of the L. P. (Amendment) Act, 1926, where by statute settled land is or becomes vested in the trustees of the settlement upon the statutory trusts (as would happen under section 36 of the S. L. Act) such trustees and their successors in office also have all the additional or larger powers, if any, conferred by the settlement on the tenant for life, statutory owners or trustees of the settlement.

On the other hand, in the case of express trusts for sale wider powers may be expressly conferred on the trustees, although it appears that such wider powers must not be made exercisable outside the perpetuity period; *Re Allot* (*u*).

The second difference is that in express trusts the settlor may limit the discretion of the trustees by granting land to trustees on trust, at the request or with the consent of some person, to sell. In such a case a purchaser is concerned to see that the request or consent has been made or given, subject to the provisions of section 26 of the L. P. Act under which if the consent of more than two persons is required then in favour of a purchaser the consent of any two of such persons to their execution of the trust or to the exercise of any statutory or other powers vested in the trustees shall be deemed sufficient, and if the person whose consent is requisite is not *sui juris* or becomes subject to disability, his consent shall not in favour of a purchaser be deemed to be requisite to the execution of trust or the exercise of any power.

Thirdly, trustees upon the statutory trusts are required by section 26 (3), as amended by the L. P. (Amendment) Act, 1926, to consult the persons of full age beneficially interested in possession in the rents and profits until sale and as far as consistent with the general interest of the trust to give effect to the wishes of such persons or in the case of dispute of the majority (according to the value of their combined interests) of such persons. But a purchaser is not concerned to see whether the provisions of the subsection have been complied with. It is expressly provided that in the case of express trusts for sale the subsection is not to apply unless the contrary appears in the disposition creating the trust.

Fourthly, statutory trusts for sale may displace express provisions in the settlement as to the mode of exercising the powers of the trustees.

Thus, in *Re House* (*x*) the testator made a devise which brought the statutory trusts into operation; he, later, made a codicil by which he empowered his trustees, after the expiration of five years from his death, to sell the property by public auction but not by private treaty.

(*u*) [1924] 2 Ch. 498.
(*x*) [1929] 2 Ch. 166.

Clauson, J., as he then was, held that the trustees holding upon the statutory trusts could sell the land notwithstanding the restrictions sought to be imposed by the codicil.

As to Points of Likeness.

These may, I think, be grouped under four heads.

In the first place all the trustees must concur in a sale and if one or more should refuse to concur an application to the Court is essential. In the case of an express trust for sale it has long been settled that the trust for sale overrides the power to postpone sale and it is therefore the duty of the Court in normal circumstances to order a sale unless the trustees unanimously agree to postpone sale; *Re Roth* (*y*) and *Re Hilton* (*z*). And this principle was applied in *Re Mayo* (*a*) to statutory trusts for sale.

The facts in *Re Mayo* were that a testator had appointed his son, his daughter and a third person to be his trustees and devised certain freehold property to them on trust to pay the rents and profits to his wife for life and after her death to hold on trust for his son and daughter in equal shares. The testator died in 1936 and his widow died in 1939 and thereupon the property became vested in the trustees upon the statutory trusts. The son requested his co-trustees to concur with him in exercising the statutory trust for sale, but they refused to do so. Simonds, J., as he then was, directed the trustees to concur with the son in taking all steps for the sale of the property. It will be observed that in this case there were only two beneficiaries and they were in disagreement, but I would suggest that having regard to section 26 (3) of the Law of Property Act, 1925, the Court would not necessarily order a sale where the majority in value of the beneficiaries desire that the power of postponement should be exercised. In any case the principle that the trust for sale prevails is not inflexible.

In *Re Buchanan Wollaston's Conveyance* (*b*) four persons who were respectively the owners of certain dwelling-houses purchased certain open land adjoining, finding the purchase money in unequal shares, and this open land was conveyed to them as joint tenants—thus bringing into operation the statutory trusts for sale. They afterwards entered into a deed of covenant which recited that they had bought the land so as to secure that it should not be used as a nuisance, annoyance or to cause depreciation in the value of their houses and which regulated the future user of the land. Subsequently one of the parties, having sold his house, desired the land to be sold without restrictions as to building contrary to the wishes of the other parties. Farwell, J., refused to make an order for sale, saying (*bb*)—

> "The Law of Property Act, 1925, has put these persons in the position of trustees holding on trust for sale and the plaintiff is seeking to take advantage of that fact to escape from the obligations which he has undertaken. I feel strongly that this Court should not assist in that attempt. The relief which he seeks he

(*y*) (1896), 74 L. T. 56.
(*z*) [1909] 2 Ch. 548.
(*a*) [1943] Ch. 302.
(*b*) [1939] Ch. 217.
(*bb*) *Supra*, at pp. 223–4.

can obtain only in the Court of Equity and that Court will not extend relief to one who is putting forward a claim to equitable assistance merely to enable him thereby to escape from his contractual obligations."

It is curious that section 26 (3) of the L. P. Act, 1925, which requires the trustees to give effect to the wishes of the majority in value of the beneficiaries, was not apparently cited in argument.

The second point of likeness between statutory and express trusts for sale is to be found in section 23 of the L. P. Act, which provides that where land is subject to a trust for sale such trust shall, so far as regards the safety and protection of any purchaser thereunder, be deemed to be subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds of sale. This, of course, gets over the difficulty as far as a purchaser is concerned that the beneficiary under the trust for sale by *sui juris* may have elected to reconvert.

Thirdly, section 27 (2), which requires that the proceeds of sale shall not be paid to or applied by the direction of fewer than two persons as trustees for sale except where the trustee is a trust corporation, applies equally to express trusts and to statutory trusts.

The fourth likeness is that section 29 empowers all trustees for sale revocably to delegate their powers of and incidental to leasing, accepting surrenders of leases and management to any person of full age (not being merely an annuitant) entitled to the net rents and profits of the land during his life or for any less period.

2. *Position of the Beneficiaries.*

Turning now to the position of the beneficiaries under a trust for sale, whether express or statutory, we find that in general their position is the same.

Thus, in the first place, where a residuary gift in a will includes leaseholds, the rule in *Howe* v. *Earl of Dartmouth* (*c*) is not applicable, either where the residuary gift takes the form of an express trust for sale as in *Re Brooker* (*d*) or in a gift bringing into operation the statutory trusts (by giving life interests in undivided shares) as in *Re Barton* (*e*).

But the fundamental likeness between the position of beneficiaries under the two types of trust for sale is that the equitable doctrine of conversion applies and the interests of the beneficiaries are treated as personalty and not realty. Thus, in *Re Kempthorne* (*f*) a testator seised of certain freehold property and also of undivided shares in other property, by a will made in 1911 devised to his brother " all my freehold and leasehold property " and bequeathed his personalty on certain trusts. He died in 1928 and the Court of Appeal held that, as the freehold properties in which he had undivided shares was subjected to the statutory trusts for sale, the testator's interest had been converted into personalty and passed under the gift of personalty. A more drastic application of the doctrine of conversion is found in *Re*

(*c*) (1802), Ves. 137.
(*d*) [1928] W. N. 93.
(*e*) [1909] Ch. 200.
(*f*) [1930] 1 Ch. 268.

Newman (*g*), where a testator by his will made in 1922 devised to his brother " all my moiety or equal half part or share and all other my share " in certain freehold property. The testator died in 1929 without having altered or confirmed his will, and Farwell, J., held that the moiety was converted into personalty by the imposition of the statutory trusts, and accordingly the brother took nothing under the specific devise.

On the other hand, in *Re Mellish* (*h*), where the gift was of all the testator's share and interest in certain property, it was held that the words " share and interest " were wide enough to cover the testator's interest in the property or in the proceeds of sale thereof.

Mr. Hargreaves, writing this year in the *Modern Law Review*, talks of " cases, like *Re Kempthorne* and its bastard brood, a line of decisions which the future historian will class with *Shelley's Case* as a singular aberration of the judicial mind ". But, much as I respect Mr. Hargreave's learning, I must confess that I find difficulty in accepting his strictures. The cases seem to me to be a logical application of the doctrine of conversion and, even if the doctrine was stretched to its limits in *Re Newman*, I have always been brought up on the maxim, " Hard cases make bad law ", and if *Re Kempthorne* and *Re Newman* had been otherwise decided doubts would inevitably arise as to the application of the doctrine of conversion to statutory trusts for sale. However that may be, the doctrine now appears to be well established and found an application in the recent case of *Edwards* v. *Hall* (*i*) where the plaintiff had been one of several tenants in common of a farm let to the defendant, and in 1944 she, the plaintiff, acquired by purchase the interests of the other tenants in common and became the sole freeholder. On September 27, 1947, she gave the defendant notice to quit on September 29, 1948. Now, under the Defence (General) Regulations, 1939, where the whole or any part of an agricultural holding had been sold in pursuance of a contract of sale made since September 3, 1939, the written consent of the Minister of Agriculture and Fisheries was required to a notice to quit. But the Lord Chief Justice held that there had not been a sale of the holding or any part thereof within the meaning of the regulations because what the other tenants in common sold to the plaintiff was personalty. But in so far as His Lordship said that the plaintiff as one tenant in common had, before the sale to her, an undivided interest in every piece of the land and so had all the other tenants in common, I must, with all deference, differ from him. I submit that what the plaintiff had was an undivided interest in the proceeds of sale of the land and in the rents and profits thereof until sale.

But although as regards the doctrine of conversion the interests of the beneficiaries are the same whether the trust for sale is express or statutory, their interests are in other respects not identical because in the case of statutory trusts for sale it appears that the statutory trusts may displace provisions contained in the instrument creating the beneficial interests. Thus, in *Re Flint* (*k*) a testator who died in 1920

(*g*) [1930] 2 Ch. 409.
(*h*) [1929] 2 K. B. 82.
(*i*) [1949] 1 All E. R. 362.
(*k*) [1927] 1 Ch. 570.

gave his property to trustees in trust for various beneficiaries in undivided shares and empowered his trustees to sell any part of his estate subject to a right of pre-emption given to his son Alfred (one of the beneficiaries) in respect of certain specified freehold property (which I shall call Property A). Under the statutory provisions the legal estate in the land became vested in the trustees upon the statutory trusts and an originating summons was taken out to determine whether Alfred was entitled to require the trustees before exercising the statutory trust for sale to offer Property A to him in accordance with the provisions of the will. On behalf of Alfred, section 3 (1) of the Law of Property Act, 1925, was cited. This section provides that where, by reason of the exercise of any equitable power or under any trust affecting the proceeds of sale, any person of full age becomes entitled to require a legal estate in the land to be vested in him in priority to the trust for sale, the trustees for sale shall (if so requested in writing) be bound to transfer or create such legal estates, to take effect in priority to the trust for sale, as may be required for giving effect to the rights of the person so entitled. It was contended that this subsection entitled Alfred, if he desired to exercise his right of pre-emption, to call for the legal estate in Property A in priority to the statutory trusts.

Astbury, J., held that the right of pre-emption was not enforceable against the statutory trusts as an equitable interest or power within the meaning of section 3 of the L. P. Act. He said : " Even under the will the right of pre-emption is not a right that is prior to the trust or power of sale. It only arises on the exercise of that trust or power. The above subsection has therefore no application ". I must confess that I do not feel altogether happy about this decision because, with respect, I am of opinion that the subsection in question does not require that the equitable power or trust should be prior to the trust for sale. I suggest that a trust affecting the proceeds of sale may nevertheless entitle a legal estate to be created having priority to the trust for sale, *e.g.*, a legal mortgage might be created to give effect to a trust affecting the proceeds of sale.

I prefer the view adopted in *Re Davies' Will Trusts* (*l*), that beneficial rights ought not to be violently affected by a mere change of machinery.

In *Re Davies' Will Trusts*, under the will of a testator who died before 1926, his nephew was entitled to a share of the income of a certain farm " for life or so long as he resides upon and assists in the management of his said farm ". On January 1, 1926, the farm became vested in trustees upon the statutory trusts and the question in issue was whether upon the sale of the farm or upon the exercise by the trustees of their statutory powers of leasing the interest of the nephew in the income would determine.

Of course, if this had been settled land of which the nephew had been tenant for life, no difficulty would have arisen because section 106 of the Settled Land Act would have prevented his life interest terminating on the exercise of any statutory power. Under section 35 of the Law of Property Act trustees holding upon the statutory trusts are to stand possessed of the net proceeds of sale and the net rents and profits until

(*l*) [1932] 1 Ch. 530.

sale upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons interested. Maugham, J., as he then was, while pointing out that section 35 does not distinctly indicate that the powers and provisions therein mentioned include a provision that the exercise of the statutory trusts shall not occasion a forfeiture, referred to section 26 (3) of the Act under which trustees for sale must as far as possible consult the persons interested in possession in the rents and profits until sale, and preferred to place a benevolent construction on these sections. He therefore held that the powers and provisions referred to in section 35 included, by implication, a provision the effect of which would preclude the possibility of the nephew forfeiting his interest in the farm during his lifetime by reason of the exercise of the statutory trusts.

If I may summarise the position as I see it, it is that, while in the exercise of the trust for sale and the statutory powers there are substantial differences according as the trust for sale is express or statutory, nevertheless the material interests of the beneficiaries are largely identical in both types of trust for sale. But because of the substantial differences as regards the position and powers of the trustees one must always consider when conveying or devising property to persons in undivided shares whether, in the circumstance of the particular case, it is better to convey or devise simply to the beneficiaries as tenants in common or to convey or devise to trustees upon trust for sale and to hold the proceeds for sale and the rents and profits until sale for the persons in question as tenants in common. I think it will appear from what I have said that in my view it is usually preferable to adopt the latter course.

Malcolm M. Lewis.

DAMAGE TO THE REVERSION

By E. O. Walford, LL.D., Solicitor

It is clear enough that since the passing of the Landlord and Tenant Act, 1927, a lessor cannot recover against his lessee in respect of the breach of a covenant to put or keep or leave premises in repair any sum in excess of the damage to the reversion. Section 18 of that Act is quite explicit upon that point. There may of course be more than one reversion. For example, the reversion immediately expectant upon the term may be a lease with only a day to run. Hence it is sometimes asked, "How can the lessor recover any substantial sum by way of damages if his reversion is valueless as it might be, for example, where proceedings were commenced a very short while before the lessor's own lease had run out?" Long before the passing of the Landlord and Tenant Act, 1927, the House of Lords had supplied the answer to that problem in the case of *Conquest* v. *Ebbetts*, [1896] A. C. 490. The essential facts were as follows:—

(1) A was the lessee of certain premises which he held under a repairing lease for a term of sixty-one years at £350 per annum.

(2) A sub-demised those premises to B for the above-mentioned term less ten days at an improved rent of approximately £100 per annum imposing upon B substantially the same repairing liability as A had himself undertaken in the lease which he held.

(3) The sub-lease was so framed as to give notice to B that it was a sub-lease.

(4) The sub-lessee B failed to perform the repairing covenants and about three and a half years before the sub-term expired A's assignee brought an action against the personal representatives of B for damages in respect of the breach of the repairing covenants.

(5) The assessment of damages was referred to an official referee who fixed them at £1,305, that sum being the cost of repairing the premises in accordance with B's covenant, less a certain rebate on account of the fact that the sub-lease had still some years to run.

(6) The Court of Appeal affirmed the report of the official referee.

Thus matters stood when the defendants appealed to the House of Lords. There it was stoutly maintained by counsel for the defendants that the measure of damages was the depreciation in value of the reversion, that the value of the sub-lessors' leasehold reversion was not more than £350 even if the property had been kept in repair, because the sub-lessors' only interest in that case was the receipt of the improved rent of £100 per year for three and a half years, and that to give more than that sum by way of damages would be to indemnify the sub-lessors against the covenants of the head lease, and that as the sub-lease contained no covenant by the sub-lessee to indemnify the sub-lessors against liability under those covenants the sub-lessee was not liable to do so.

Value of the Reversion

Counsel's plea on behalf of the sub-lessee was not accepted by the House of Lords. Lord Herschell stated the position as follows :—

" In the present case, if the test be applied of inquiring how much the value of the respondents' [*i.e.*, the sub-lessors'] reversion has been diminished by the breach of covenant, a test for which I understand the appellants to contend, I cannot see how there has been any error in the assessment of damages. If the premises were now in good repair, the reversion of the respondents would secure them the improved rent of £100 a year to the end of the term, *without any liability on their part*, unless it were to the extent to which repairs subsequently became necessary ".

His Lordship refused to speculate upon the question whether the sub-lessors might, owing to the changed circumstances at the end of the term, escape liability by reason of the possibility that the freeholder might make a different use of the site and accept a smaller sum from the sub-lessors.

It is sufficiently clear from this decision that the fact that the saleable value of the immediate reversion on the footing that the property is put into good repair is not always the true measure of damages for the breach of a covenant to keep in repair *where the lease is a sub-lease*. If the sub-lessee undertakes the same liability as the sub-lessor has

undertaken and has notice of the head lease then the sub-lessee's liability still is to be measured in accordance with the test laid down by Lord Herschell, as set out above.

What if the sub-lessee has undertaken only a portion of the liability of the sub-lessor under the head lease in respect of repairs? It seems plain that the only change in the formula in that case is that the words italicised by me above "without any liability on their part", would then read "without any liability on their part beyond the cost of the repairs for which the respondents [the sub-lessors] had already become liable under their head lease and for which the sub-lessee was not liable under his covenant". In such a case the damages would, of course, have been limited to the cost of the repairs which the sub-lessee had undertaken to effect, so that the damages would still be the cost of those repairs subject to suitable abatement having regard to the length of the term at the date of the proceedings. It is in this manner that the "damage to the reversion" would be measured. It will not have escaped notice that the net result might be that the damages would exceed the value of the reversion because the reversion might be practically valueless in any event, but a heavy liability whilst the disrepair continued.

Damages Where Term Lengthy

It does not follow that the rule last mentioned can be adopted in all cases. Although in practice a surveyor will normally allow a generous sum to cover the cost of putting premises into repair when he is deciding on the price which should be offered for a long lease, it may well be that a lessor seeking to recover such a sum by way of damages in the case of a 999 year lease or even a lease with (say) fifty or eighty years to run will fail to recover anything like that sum. In *Doe* d. *Worcester Trustees* v. *Rowlands*, 9 C. & P. 734, Coleridge, J., said:

> "In estimating the damages in cases where the lease has a long time to run, it is not fair to take the amount that would be necessary to put the premises into repair as the measure of damages . . . The true question therefore is, to what extent is the reversion injured by the non-repair of the premises?"

His Lordship also observed that if the lease had ninety-nine years to run it could not make much difference in the value of the reversion whether the premises were in repair or not. In *Conquest's Case*, *supra*, Lord Herschell remarked that this observation would not be applicable in all cases. There were circumstances in which it might be of the utmost importance to the reversioners that the buildings should be in a proper state of repair. Lord Herschell did not furnish an example, but perhaps the following might be a suitable example. A theatre is demised by A to B at a rack rent for a term of ninety-nine years and the preservation of the property in repair is essential to the continued use of the property as a theatre, because for example, necessary licences will not be renewed, or it will be impossible to continue to attract large audiences, owing to the neglect by the lessees of their repairing obligations. In such circumstances the value of the reversion might be seriously affected, because (for example) the outcome of the continued neglect of the property would be that the lessees themselves would not

get the custom necessary to enable them to pay the rent, and if in a few years time the property was thrown back upon the lessor in a dilapidated condition—possibly after forfeiture of the licences or some of them—it is obvious the failure of the lessee to keep the premises in repair would have made a great deal of difference to the value of the reversion. In passing, it may be mentioned that in at least one standard text-book on the law of landlord and tenant the statement may still be found that when the action is brought during the term the measure of damages is the diminution of the value of the reversion which results from the breach. Such a statement appears to imply that if the action is brought at the end of the term a different measure of damages will apply. Since the enactment of section 18 of the Landlord and Tenant Act, 1927, such a statement is misleading (so far as concerns the maximum liability of the lessee), as that section applies the test of damage to the reversion to breaches of covenants to keep or put premises in repair during the term *and* of covenants to leave or put premises in repair at the end of the term.

Reversion Immediate or Remote

Whilst dealing with this point it may not be out of place to draw attention to the fact that section 18 of the Landlord and Tenant Act, 1927, applies the test of diminution of the value of the reversion (*whether immediate or not*) as the maximum liability. It is plain, therefore, that at the present day the rule in *Conquest* v. *Ebbetts* as to the injury to the reversion still stands in the sense that the amount which would be arrived at would be similar. But what is meant by the words " immediate or not " italicised above? It would seem to be impossible to construe that phrase as referring by the word " immediate " to the case in which the term has expired so that one has regard only to the immediate reversion in such cases, and that in cases where the term is still running one has regard to the words " or not ", *i.e.*, " not immediate ". The fallacy of such an argument is that even during the term of a lease the reversion of the lessor is normally the " immediate reversion ", *i.e.*, as it is usually expressed in surrenders, " the reversion immediately expectant on the term granted by the lease ".

Suppose that during the currency of a lease a reversionary lease is granted, this will in no way alter the fact that the landlord's reversion upon the previous lease is still the *immediate* reversion upon the term granted by that lease. The grant of the reversionary lease would vest a leasehold term in the grantee, but the freehold reversion would still be in the landlord in respect of the original leasehold term and it would be the *immediate* reversion, despite the existence of a reversionary lease commencing upon or after the expiry of the original lease. We must therefore look elsewhere for a case to which the last part of the phrase " whether immediate or not " will apply. As will be seen from the later part of this article some guidance is afforded in certain cases by the decisions concerning the reversion to which reference is made in this provision; but the meaning of the words " or not " remains unexplained by any decision since 1927. It is, however, submitted later that those words would meet the case where a concurrent lease had been granted.

Conquest v. Ebbetts Again

This is a suitable point at which to mention the aftermath of *Conquest* v. *Ebbetts*, [1896] A. C. 490, the facts and decision in which case have already been recorded at the beginning of this article. It will be recalled that the sub-lessors obtained judgment for £1,305 a few years before both the sub-lessors' and the sub-lessee's term expired. They did not, however, expend any part of the sum recovered under this judgment in repairing the property, but merely waited until their lessee's term had expired and then commenced another action against him. It will be appreciated that at the present time such a situation may easily arise, having regard to the difficulty in obtaining necessary licences and the very high cost of building operations. In the lessors' action the lessors claimed the sum required to put the premises into such a state of repair as was necessary in order to comply with the lessee's covenants. Having regard to the fact that they had already received £1,305 with which to repair the property they offered to give credit to the lessee for that sum. That degree of benevolence did not content the lessee who submitted that his full liability under the covenants had been ascertained and discharged by the payment in the former action of £1,305, and that the measure of damages was not as claimed by the lessors but was limited to " additional acts of non-repair " since the date of the judgment in the former action. In other words the sub-lessee contended that the Court should first consider the state of repair (or perhaps one should say disrepair) of the property at the time of the former judgment and then ascertain the amount which it would cost at the date of the further action to put the premises into the same condition as they were when the order in the first action was made, the latter amount being the amount of the damages recoverable. That contention was not accepted by the Court, and the only addition made by the Court to the proffered allowance of £1,305 was interest at 4 per cent. per annum thereon from the date of the receipt of the £1,305 up to the date of termination of the lease. At the present day the difference between the figure produced by the formula proposed by the sub-lessee and that sanctioned by the Court in this case might be very great indeed if several years had elapsed.

The Court observed that the measure of damages in the former action was the damage to the reversion, but the question before the Court (on the covenant to deliver up in repair) was " What is the state of disrepair now? "

At the present day it may be said that the latter test is not correct, but the reason is *not* that the test in both cases is what is the damage to the reversion. There would appear to be no reason why the old decisions should not be applied provided that it is borne in mind that if the damages to be awarded under the rules laid down in the old cases would exceed the damage to the reversion (*immediate or remote*) then they are to be reduced accordingly.

Proof of Damage

It seems to follow as a natural consequence of the rule that damages must not exceed the amount by which the value of the reversion is

diminished, that if upon a sale of the premises in their dilapidated condition the lessor could obtain at least the same amount as he would obtain by a sale of the premises in the condition in which they would be if the lessee had complied with his obligations, then no damages would be recoverable. Apart from recent decisions which are mentioned later in this article a simple example is to be found in the case of a very old building standing on valuable land, where the true value of the land lies in its potentialities as a building site, and a buyer would give as much, or more, for the land if the building thereon were completely demolished. Lest I am accused of forgetting the effect of the Town and Country Planning Act, 1947, I hasten to say that I should be very glad to forget that Act if I could, and even more glad to be able to foresee its ultimate general effect upon the value of building land. Unfortunately the power of second sight is denied to me. At first sight it seems that owners are not prepared to sell building land more cheaply since the Act than before it. If, despite governmental warnings, they can hold out long enough then the truth of the saying that the consumer always pays may be demonstrated in relation to land nominally shorn of its development value.

However—returning to the question of proof of diminution of the value of the reversion—it is always to be borne in mind that section 18 of the Landlord and Tenant Act, 1927, does not declare that the measure of damages for breach of a covenant to keep, leave or put premises in repair is the amount by which the value of the reversion is diminished; but that such damages shall not exceed that amount. If, therefore, a case be found in which the cost of making good the damage is less than the diminution in the value of the reversion, there is, apparently, no reason why the damages recoverable should not be limited to the cost of making good the damage. It must, however, be but rarely that such a condition of affairs could arise, apart from special circumstances. Thus, whilst it is impossible to get a licence to repair a very dilapidated building, it may be that the lessors' interest is saleable only at an extremely low price owing to the very dilapidated condition in which his lessee has left it upon the termination of his lease. If the old rule is applied the lessee would be liable only for the actual cost of making good the dilapidations. In practice, in the writer's experience, the old rule is normally applied by a surveyor advising as to the amount recoverable in such a case, although that fact is not, of course, conclusive of the question.

Market Conditions

Under present conditions there is no doubt that when a repairing lease comes to an end and the lessee has failed to comply with his repairing covenants, a lessor can often let the premises again upon a repairing lease at the same rent without expending any moneys in the repair of the premises. Consequently it is sometimes urged on behalf of the defaulting lessee that no damages should be awarded to the lessor because there is no "damage to the reversion". This proposition is entirely fallacious and ample authority is to be found to dispose of it. Nor is this proposition a novel one. For example, in *Morgan* v. *Hardy* (1886), 17 Q. B. D. (reversed on appeal on a different point) it was

put forward unsuccessfully. In that case it was shown that owing to a change in the character of the neighbourhood a house was as valuable at the end of the term without some of the repairs which ought to have been done as it would have been if the lessee had effected those repairs, yet the Court held that the lessee must meet the cost of those repairs. I refer to this case as showing that the contention here under consideration is not new, and not as representing the present law. If the true view of *Morgan* v. *Hardy* is that there was in that case no damage to the reversion, it is plain that at the present day nominal damages only could be recovered in such a case. It does in fact furnish a very good example of a case in which section 18 of the Landlord and Tenant Act, 1927, has changed the law. That type of case is, however, quite different from one in which owing to market conditions of a general or local character or to other special circumstances the lessor can obtain a tenant at the same rent, or even a higher rent, than that paid by the defaulting lessee. That fact by itself is no proof that the lessor could not have obtained a still higher rent if the premises were in a better condition. In point of fact these speculations are, it is submitted, unnecessary. It would appear that as the damages are to be assessed at the end of the term, it is of no consequence whatever whether the lessor is or is not able thereafter to grant a lease for a further period on beneficial terms owing to prevailing conditions. To adopt the words of Parke, B., in *Woodhouse* v. *Walker*, 5 Q. B. D. 408, "the proper measure is by (*sic*) how much less the premises would sell for in consequence of the wrongful act of the defendant". It is submitted that that dictum is still good law in cases where the cost of repair would exceed the amount arrived at by applying the test last mentioned, except in the case of a sub-lease : see *Conquest* v. *Ebbetts*, *supra*, where the head lease may be a liability and not an asset. The case of a valuable building site has already been mentioned, and another case in which the cost of repair would not be the true test is as follows. The tenant undertakes in his lease to keep the premises in the state of repair in which they will be when he has put them into repair, which seems to be equivalent to a covenant to put and keep the premises in repair. If they are completely burnt down and nothing is done by the tenant then the damages must not exceed the diminution in the value of the reversion. Thus, suppose that in such a case the cost of rebuilding is £2,000, but upon the rebuilding of the house it will be worth (with the site) £2,500, whereas even if the property were in such repair as was required by the lessee's covenant it would have been worth only £1,500 (including the site) and the lease is not a sub-lease (see *Conquest* v. *Ebbetts*, *supra*), then the cost of making good cannot, it is thought, be recovered. The lessor cannot have a new building for an old one, and must be content with the diminution in the value of the property, *i.e.*, he will recover only £1,500 less the value of the site with such ruins thereon as there may be. In determining the value of the site it would seem proper to deduct from it the cost of demolition and clearance. It is submitted that it would not be permissible to add to the figure finally ascertained by the application of the foregoing rules a sum equal to the loss likely to result from the probable delay in getting the necessary plans prepared and approved, and the necessary licences granted.

Forfeiture or Determination

How is the reversion to be valued if after forfeiture or premature determination of a lease (as distinct from the expiry of the term) the landlord claims damages for breach of the covenant to leave the premises in repair? That question is answered by the decision in *Hanson* v. *Newman* (1934), 103 L. J. Ch. 124. The reversion is to be valued on the footing that the term has ended. The same is true of a case where the landlord by his writ claims possession under the proviso for entry and damages for failure to leave the premises in repair. It was contended in *Hanson* v. *Newman, supra,* on behalf of the tenant that the method of valuation of the reversion in such a case was first to value it on the footing that it was subject to the lease for the remainder of the term granted by the lease (*i.e.*, as if forfeiture had not taken place); secondly, to ascertain the actual value of the property at the date of forfeiture, and set the first value against the second. The Court of Appeal rejected this contention. Lawrence, L.J., said that it was " plain that the reversion referred to in the section means the freehold or leasehold estate of the landlord subject to the lease or sub-lease " [*i.e.*, if the lessor were himself a leaseholder]. Romer, L.J., in the same case remarked that having regard to the fact that on August 9 (the date of issue of the writ claiming possession and damages) the lessors " elected to determine, and did determine, the lease, no days of the term are unexpired ". Accordingly, the net result in such a case is that the damages are normally to be determined by ascertaining the value of the lessor's interest in the premises on the footing that the premises had been kept or put into the condition required by the terms of the lease and then deducting the value of the premises in the condition in which they are found at the date of forfeiture. In many cases a simpler formula, namely, the cost of putting the premises into such repair as is required by the terms of the lease, may be adopted and will produce the same result. In some cases where the nature of the works to be done is such that the premises must remain unoccupied for a certain time a careful surveyor would add a sum in respect of loss of rent during that period. It is clear that before the passing of the Landlord and Tenant Act, 1927, such a loss could be taken into account. As in such a case a careful surveyor valuing the lessor's interest in the premises in the condition in which they are found after the breach would make a deduction in respect of loss of rent whilst the premises were being repaired, it seems reasonable to suggest that the Act of 1927 has not affected the position in that respect.

Reversionary Lease

In an earlier case of *Terroni* v. *Corsini*, [1931] 1 Ch. 515, the lessor had demised the property to three persons for a term ending on March 25, 1930, and in 1929 had granted to them a reversionary lease for fourteen years from March 25, 1930.

The question which came before the Court was whether at a date just subsequent to the date of the grant of the reversionary lease but prior to the commencement of the term the damages recoverable for dilapidations were to be measured according to the face of the market value of the reversion expectant (a) on the termination of the original

lease, or (b) on the termination of the reversionary lease. It was held that the reversion for the purpose of section 18 of the Landlord and Tenant Act, 1927, was that expectant on the original lease, and that the reversionary lease which was to take effect after the date of assessment of the damages must be disregarded.

Reversion Immediate or not

To what type of case can the last two words of the phrase "immediate or not" apply? Whilst it may be that other examples can be found it would seem that if the freeholder A grants to B a lease expiring on, say June 24, 1955, and then grants to C a concurrent lease commencing immediately and expiring on or after June 24, 1955, then the reversion would no longer be immediate, although it would still be his reversion to which regard would be had if he commenced proceedings against B for damages in respect of the breach of repairing covenants. That A would no longer have the immediate reversion upon B's term is quite clear, for it is well settled that in the case of such a concurrent lease the effect is to vest in the holder of the concurrent lessee C the reversion expectant upon B's term, together with the benefit of the rent and covenants : *Harmer* v. *Bean*, 3 C. & K. 307. Suppose that B has covenanted to keep the property in repair, and C, the concurrent lessee, sues B for breach of that covenant during B's term. Is it then material for the Court to ascertain whether C has undertaken himself to keep the property in repair and whether B has notice of this fact? Presumably not : for B could not have had notice of the concurrent lease to C when he took his lease. However, the answer to this question does not appear to be revealed by the decisions.

No Diminution

In two recent cases it has been demonstrated that the section just mentioned may save a lessee from liability to comply with his covenant to repair if the wind is in the right direction.

The first of these cases was *Landeau* v. *Marchbank*, [1949] 2 All E. R. 172. The essential facts of that case can be stated very shortly. On the termination of a certain lease the premises were sold by the landlord to a purchaser who intended to convert them into flats and maisonettes. It was clear that certain works within the repairing covenant would be rendered valueless owing to the proposed conversion, but the question was whether damages were recoverable in respect of all other works within the repairing covenant. There was no evidence before the Court that the failure to comply with the repairing covenant had caused a diminution in the value of the reversion. On those facts Lynskey, J., held that the lessor was entitled only to nominal damages. The interesting feature in connection with that decision is, that if it was rightly decided, the onus is upon the lessor to prove such diminution, and not upon the lessee to prove that the damages claimed exceed the diminution in the value of the reversion. The moral is that it is clearly necessary to instruct any surveyor who is preparing a schedule of dilapidations on the termination of a lease that his report should state not merely the cost of executing the works necessary to comply with the lessee's repairing covenant but also his estimate of the diminution

in the market price of the reversion owing to the non-execution of the works. Lynskey, J., in the course of his judgment said, " It seems to me that having regard to those decisions [*Espir* v. *Basil Street Hotel, Ltd.*, [1936] 3 All E. R. 91, and *Salisbury* v. *Gilmore*, [1942] 1 All E. R. 457] the fact that repairs are necessary is not in itself even *prima facie* evidence of damage to the value of the reversion ", although later he qualifies that statement as follows, " If very extensive repairs were necessary to a small property, then, of course, the inference would be clear; if one had very small repairs to a large property of great value, then the inference might be impossible to draw. It must depend on the circumstances ". It is respectfully submitted that the last sentence gives the true answer.

The second recent case bearing upon the measure of damages payable by a lessee for breach of covenant was *James* v. *Hutton*, [1949] 2 All E. R. 243, and arose out of the grant of a licence granted by the lessor to the lessee permitting the lessee to construct a new shop front, which was completed in February, 1940. The premises were requisitioned a few months later by the Crown and had remained so ever since that time. In 1945 the lease was terminated by agreement and the lessor thereupon required the lessee to reinstate the original shop front pursuant to a covenant in the licence to construct the new shop front, which required the lessee, on the expiration or sooner determination of the lease, to restore the premises to their original condition. Pausing at this stage, it may be helpful if it is pointed out that if the covenant by the lessee had been either to restore as above mentioned or to pay to the lessor the cost of so restoring the premises as the lessor should elect (by notice given within a specified period), there is good ground for thinking that the exercise by the lessor of the option to require the payment of a sum equal to the cost of restoration would have enabled him to recover that sum even if he did not intend to restore the original shop front, provided that its recovery was not made conditional upon such restoration by the lessor. Cf. *Moss' Empires, Ltd.* v. *Olympia (Liverpool), Ltd.*, [1939] 3 All E. R. 460, and *Plummer* v. *Ramsey* (1934), 78 S. J. 175, and *Walford's Draft Leases*, 3rd ed., p. 163, para. 2, and p. 167, para. 6.

However, in the instant case no such option was contained in the licence, and the question was whether the lessor could recover substantial damages for the breach of covenant to restore the premises to their former condition. It will be observed that the covenant was not contained in the lease, but in the licence.

In *James* v. *Hutton*, *supra*, the Court of Appeal held that the normal rule concerning damages for breach of contract must be applied, and that no damages being proved the lessor could recover only nominal damages. Lord Goddard, C.J., intimated that the rule in *Joyner* v. *Weeks*, *supra*, was not applicable; but curiously enough when making observations on that case he did not refer to section 18 of the Landlord and Tenant Act, 1927, which limits the damages recoverable to the diminution of the value of the reversion. His language concerning the measure of damages for failure to deliver up a house in repair is very different from that employed by Lynskey, J., in *Landeau's Case*, *supra*. He said that in such a case " the landlord must suffer some

damage at least so long as the house remains in existence . . . A dilapidated house must be worth less than a house in a proper state of repair "; and having pointed out also that a house in good repair would ordinarily fetch more than one which is out of repair, he added that " Damage is therefore suffered. The measure of damages was laid down in *Joyner* v. *Weeks* ". His Lordship later referred to the fact that in that case the Divisional Court had assessed the damages according to the injury to the reversion and that the Court of Appeal there held that the rule in these cases was that the damage was the cost of the work necessary to put the house into repair. The omission from those observations of any allusion to the limitation imposed by section 18 of the Landlord and Tenant Act, 1927 (which goes far to restore the rule laid down by the Divisional Court) seems strange; but as it was held that the appropriate course was to apply the general rule as to damages for breach of contract, and " to ascertain what the damages actually suffered amount to ", his Lordship's observations concerning *Joyner* v. *Weeks* may no doubt be treated as *obiter*. In the result the Court came to the conclusion that there was no evidence that the failure to restore the original shop front had caused damage to the lessor, and awarded nominal damages only, with the usual result as to costs.

Before leaving this case it may be worth while to mention section 19 (2) of the Landlord and Tenant Act, 1927, which imports a proviso to covenants in leases against the making of improvements without the licence or consent of the lessor and which proviso (*inter alia*) allows the lessor, when granting such licence or consent in relation to an improvement not increasing the letting value of the property, to require that the lessee should restore the property to its former condition only where such a requirement would be reasonable. It would be outside the scope of this article to deal fully with that proviso; but as the Court of Appeal considered that sub-section and expressed the view that upon the evidence before it the requirement that the lessee should reinstate did not appear to be reasonable, it will be seen that it is worth bearing in mind that proviso when framing a licence to make alterations, or advising a lessor who requires a covenant to reinstate to be inserted in the licence.

SUB-LEASES

As considerable prominence has been given in this article to the matter of sub-leases it may be suitable to conclude it with a note of various points in connection with actions by sub-lessors against their sub-lessees in respect of the breach of repairing covenants. The following points in particular have been established :—

(1) If a sub-lessor effects repairs to the premises in order to avoid forfeiture of his own lease, without having served notice on his sub-lessee requiring him to repair in accordance with the sub-lease, then the sub-lessor cannot recover the expenditure from the sub-lessee : *Williams* v. *Williams* (1874), L. R. 9 C. P. 659.

(2) Even if the sub-lease contains a repairing covenant which is in terms similar to that contained in the head lease it does not follow that the measure of damages will be the same. For

example, by the time the sub-lease has been granted the premises may be in a different condition : see *Walker* v. *Hatton* (1842), 10 M. & W. 249. The result may, of course, differ according to the wording of the covenant in question, and may be affected by the question whether the tenant has notice of the fact that the lessor is not the freeholder.

(3) The sub-lessor is not deprived of his right to recover damages for dilapidations from his sub-lessee merely by reason of the fact that the sub-lessee (as well as the sub-lessor) has been ejected owing to non-payment by the sub-lessor of the head rent : *Davies* v. *Underwood* (1857), 2 H. & N. 570.

(4) The last case for mention here is a strange one. It is strange in the sense that although the result might be regarded as satisfactory, the ground of the decision seems to be unsatisfactory. The case in question is *Espir* v. *Basil Street Hotel, Ltd.*, [1936] 3 All E. R. 91. The facts were that A held a lease of part of certain premises for a term of 98 years. He sub-let it to B for the rest of the 98 years' term less fifteen days, and the sub-lease contained a covenant by the lessee against the making of alterations without the consent of the sub-lessor A. B then obtained a lease from the superior lessors for a term of 999 years subject to A's interest, and then made certain alterations. A brought an action against B for damages. No one could quarrel with the finding of the Court that the measure of damages in an action in respect of a breach of covenant brought during the term is the diminution in the value of the reversion, but the further finding of the Court that the fact that B had acquired a 999 years' term affected the damages recoverable is not so easy to follow. The action was brought in about 1936 and the term granted by A to B then had about seventy-two years to run. As the actual damages were assessed by the county court Judge at £60, it would seem reasonably plain that when that £60 was reduced appropriately, having regard to the fact that the premises would not revert to the sub-lessor A for about seventy-two years, it would become a negligible amount in any event. The peculiar feature of the case is, however, that the Court of Appeal did not base its judgment upon that view but held that as B, the sub-lessee, was entitled in effect to possession for 999 years, the reversion of fifteen days held by the sub-lessor A being *de minimis*, there was no evidence of diminution in the value of A's reversion owing to the alteration, and therefore A was entitled only to nominal damages.

It seems difficult to follow this reasoning. The report does not disclose the answer to the question whether A was liable to the original landlords in respect of the alterations, as the terms of A's lease in that respect are not stated. In such circumstances it does not follow that anything but nominal damages should have been awarded; but the fact remains that if B was well aware that he was taking a sub-lease, the measure of damages would normally be influenced by the liability of B under the terms of his own lease : see *Conquest* v. *Ebbetts*, *supra*.

Ignoring that point, the real difficulty in relation to the *ratio decidendi* in the *Espir Case* is that it seems illogical to have regard to a lease subsequently acquired by a sub-lessee when determining the liability of a sub-lessee towards his landlord in respect of the breach of a covenant contained in the lease granted to him by his sub-lessor. The reasons for doubting whether the grant of such a new lease should be deemed to affect the sub-lessee's liability are as follows :—

(1) It would seem unsound in principle to assume that the contractual liability of B to A can be affected by anything done by B without the concurrence of A, unless that which is so done must *of necessity* benefit B by eliminating wholly or in part the damages which A might otherwise suffer.

(2) The taking by B of a 999 years' lease in his own name should, it is submitted, have been regarded as irrelevant, either on the ground that the actual personality of the holder of a 999 years' lease of the demised premises granted by a third party, namely, A's sub-lessor to B, ought not to be considered to be relevant in relation to the contractual rights of A and B *inter se*, or on the ground that it is not to be assumed that the 999 years' lease granted by A's lessor to B would remain vested in B, and that the sub-lease granted by A to B would also remain vested in B (or even in the same persons) indefinitely.

Suppose that instead of the 999 years' lease having been granted to B it had been granted to a trustee for him, the result (according to the *ratio decidendi* in the *Espir Case*) would have been quite different. Yet there was nothing to prevent B, the sub-lessee, from assigning the 999 years' term, or the sub-lease held by him to a third party at any moment. There are many possible cases in which it can be shown that in the events which have happened the plaintiff has suffered no damage, despite a breach of covenant by the defendant, with the result that the plaintiff can recover nothing from the defendant but nominal damages. It is submitted, however, that the principle involved in those cases has no relation to the question whether the value of a sub-lessor's reversion has been diminished by a breach of covenant by his sub-lessee, and that the fact that the sub-lessee has acquired a long lease, or even the freehold, from the sub-lessor's landlord, has no relation to the question last mentioned. Suppose that the breach by the sub-lessee B of his covenant involved a similar breach by the sub-lessor A of the like covenant by him in the head lease. Assume further that B had meanwhile acquired from A's landlord (the freeholder) either the freehold or a 999 years' lease, whilst still retaining the sub-lease granted to him by A. It would seem to be no answer in law to a claim by B in his capacity of reversioner that A could establish that B had himself broken the similar covenant in the sub-lease held by B from A. The question whether ultimately A could obtain reimbursement from B as sub-lessee would, it is submitted, be irrelevant. Possibly this point is made clearer by pointing out that B might himself have sub-demised the property to X on the footing that X was to perform the same covenant. The *possible* ability of B to recover damages from X would not, it is submitted, be an answer to his action against A, in such circumstances.

If these views are correct the principle underlying the decision in *Espir* v. *Basil Street Hotel, Ltd.*, *supra*, would seem to be unsound.

The decision is, however, that of the Court of Appeal, and unless and until it is submitted judicially to a process of explanation by that Court or is overruled by the House of Lords, it must be accepted as a guide in all disputes where the client is not prepared to fight the case at least up to the Court of Appeal. Moreover, even in that event it is clear that it would normally not be worth while to do so if the sub-lessee's original term had a long period to run, unless the breach was one which it was essential to remedy quickly : see *per* Lord Herschell in *Conquest* v. *Ebbetts, supra.*

The principle of avoidance of circuity of action was not invoked by the Court of Appeal in *Espir's Case*; nor was any allusion made to the possibility of consolidating actions in any of the hypothetical cases which I have suggested. It is, of course, possible that in at least one of them an answer might be found to the apparent difficulty by resort to one of the two courses last mentioned, *i.e.*, the defence of the *ratio decidendi* by reference to the avoidance of circuity of action, or by the bringing of a counter action or counterclaim by the sub-lessor.

LOCAL LAND CHARGES—SUGGESTIONS FOR REFORM

By J. F. Garner, LL.M., Solicitor

Local land charges have hitherto been treated by the majority of the legal profession simply as matters against which one searches in connection with a sale of land (if one is wise, before a binding contract is entered into : *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 579), and which, if not registered, will not affect the purchaser. This is not, however, by any means the whole story, and the additional complications of the Town and Country Planning Act, 1947, have apparently served to bring the many difficulties and anomalies of this subject into general notice, for early this year the Lord Chancellor appointed a Departmental Committee to review the position generally. It is the purpose of the present article to indicate some of what the writer considers to be the more important matters that should receive the Committee's attention, and to proffer some possible solutions of the problems thereby raised.

1. Types of Charges

There are at present the following different types of charges enforceable by or on behalf of local authorities, or registrable in the local land charges register, which are binding on the land.

(a) Local land charges properly so called. These are those charges described in the Land Charges Act, 1925 (as amended by the Law of Property (Amendment) Act, 1926), and consist of charges arising under the Public Health Acts or statutes similar thereto (*e.g.*, under section 9 of the Housing Act, 1936), and in particular " any sum which is recoverable by a local authority under any of the Acts aforesaid

from successive owners or occupiers of the property in respect of which the sum is recoverable" (*a*), and also prohibitions or restrictions on the user or mode of user of land or buildings imposed by a local authority under a covenant or agreement, or by virtue of conditions attached to a consent, approval or licence granted by a local authority, being a prohibition or restriction binding on successive owners of the land or buildings.

This class of charge does not cause any real difficulty in practice, except perhaps to ascertain whether a particular prohibition or restriction is registrable (*b*). If the charge is registered, it will be enforceable against a subsequent purchaser of the legal estate for value, and he will be deemed to have notice thereof (*c*). If it is not registered, however, the charge will be void as against a purchaser for money or money's worth of a legal estate in the land affected thereby, and if the purchaser obtains an official certificate showing a clear search, he is entitled to rely thereon (*d*).

(b) Charges required by statute to be registered in the local land charges register as if they were local land charges. These are specific statutory charges, often enforceable by or on behalf of a government department and not a local authority; they include designation orders and compulsory purchase orders made under the New Towns Act, 1946, certain orders made by the Minister of Civil Aviation under the Civil Aviation Act, 1946, supervision orders made by the Minister of Agriculture and Fisheries under the Agriculture Act, 1947, etc. It has been suggested that a purchaser will not be protected from such a charge if it is not registered, for the particular sets of rules applicable to these specific charges (*e*), do not incorporate the provision in the

(*a*) Land Charges Act, 1925, s. 15 (1), as amended by the Schedule to the Law of Property (Amendment) Act, 1926.

(*b*) Difficulties in particular have arisen since the deletion, by the Town and Country Planning Act, 1947, of the exception in the Land Charges Act, 1925, of charges arising under planning schemes. As a consequence of this deletion, it seems clear that conditions imposed in planning permissions granted under Part III of the 1947 Act are registrable in the local land charges register, and are, presumably, unenforceable if not so registered (see the writer's observations in the *Journal of Planning Law* for 1949 at pp. 183 and 393, and Mr. Crompton's arguments to the contrary, *ibid.*, p. 299). It is submitted that the point should be clarified by the Committee, particularly in view of the application of the requirement of registration to conditions imposed in interim development consents or planning permissions granted under the Town and Country Planning Act, 1932, which are now enforceable under s. 75 of the 1947 Act, as if they had been contained in planning permissions granted under Part III of the 1947 Act. A condition, which was not registrable at the time when it was created, may now therefore be unenforceable, because it was not registered at some time before the 1947 Act came into force, when the present owner purchased the property.

A further difficulty arises in connection with restrictions on the transfer of land. These were made registrable in Part IV of the register by the Amendment Rules of 1946 (S. R. & O., 1946, No. 414/L.6), but clearly only those restrictions on the transfer of land for which statutory authority for their registration exists, are in fact so registrable. The only charges for which such authority exists are the "permitted price" and the "permitted rent" registrable under s. 7 of the Building Materials and Housing Act, 1945 (as amended by s. 43 of the Housing Act, 1949), and the condition (which is specifically made registrable) providing that a dwelling in respect of which an improvement grant has been made, shall be kept available for letting, registrable under s. 23 of the Housing Act, 1499. It is suggested that the exact significance of the 1946 Amendment Rules should be clarified.

(*c*) Law of Property Act, 1925, s. 198.

(*d*) Land Charges Act, 1925, s. 15 (1), and s. 17 (3).

(*e*) *E.g.*, the New Towns Act, 1946 (Registration of Orders) Rules, 1946 (S. R. & O., 1946, No. 1896/L.23), and the Civil Aviation Act, 1946 (Registration of Orders) Rules, 1947 (S. R. & O., 1947, No. 1622/L.19), etc.

Local Land Charges Rules of 1934 (*f*), to the effect that an official certificate is to be deemed conclusive according to the tenor thereof. As has been pointed out in an article in the *Solicitors' Journal* (*g*), however, if a charge "is a local land charge for the purpose of section 15 (6) [of the Land Charges Act, 1925], which gives the Lord Chancellor the power to make rules, it must also be one for the purpose of section 15 (1)", which is the sub-section affording the protection to purchasers.

This class of charge also does not cause complications in practice, but it is submitted that it would be preferable for them to be made specifically "local land charges", and therefore subject to the general procedural code of the Local Land Charges Rules, 1934. Charges subsequently to be created under new statutes (*h*) should be treated in the same manner; there does not seem to be any reasonable justification of the present method, followed in connection with the charges discussed under this paragraph, of creating a new part of the register, and a new set of rules, for each new statutory charge.

(c) Charges imposed by statute which are binding on the land and affect any owner thereof, but which are not registrable under the Land Charges Act, 1925. These include potential rights which may be exercised by a government department or a local authority in respect of any land in the country, such as the right to requisition land under Defence Regulation 51, which rights do not affect the owner until they have crystallised in respect of a particular parcel of land. Where some action has been taken by the public authority applying the powers to a particular parcel (*e.g.*, where a requisitioning notice has been served (*i*), or a compulsory purchase order made in respect of the property (*k*)), however, a prospective purchaser of land will be vitally concerned therewith, and it seems that there should be some specific statutory means of discovering whether such a "charge" affects the land. At present these matters are normally covered in the preliminary inquiries asked of the local authority and agreed between the Law Society and the local authority associations. This system of ascertaining this vital information is, however, unsatisfactory for the following reasons:—

(i) The local authority are under no statutory duty to supply the required information.

(ii) The replies received are often uninformative, but in any case afford no protection to the prospective purchaser, as they do not have the effect of an official certificate of search.

(iii) The inquiries as at present in use are not sufficiently exhaustive.

(*f*) See S. R. & O., 1934, No. 285/L.4, rule 15, incorporating s. 17 (3) of the Land Charges Act, 1925. A minor reform sadly needed is the issue of an authoritative consolidated version of these rules.

(*g*) Issue of July 23, 1949, Vol. 93, at p. 477.

(*h*) *E.g.*, under s. 23 (5) of the Housing Act, 1949, and under the new Coast Protection Bill, when the same becomes law.

(*i*) A requisitioning notice is not at present registrable, either in the local land charges register, or in the London land charges register: *Lewisham Corporation* v. *Maloney*, [1947] 2 All E. R. 36.

(*k*) A compulsory purchase order is not registrable as a local land charge, as it does not have a restrictive effect on the user or mode of user of the land. A notice to treat is, it is submitted, registrable, for once a notice has been served, the owner cannot deal with the land so as to cast any extra expense on the acquiring authority: *Re Marylebone Improvement Act* (1871), 40 L. J. Ch. 697.

It is suggested that all these matters should be registrable in the local land charges register, and hence would have to be disclosed in the official certificate of search. It would not be necessary that charges of this nature should be unenforceable if not registered, where it was clearly the intention of Parliament that they should be valid irrespective of registration (*l*), for in such cases a person aggrieved would have an action for damages in negligence against the registrar for giving a false certificate, or against the responsible public authority who was required to register the charge, and had failed to do so.

The following matters could be registered in this manner :—

(i) Compulsory purchase orders, as soon as they have been made by the acquiring authority, without waiting for them to become operative.

(ii) Requisitioning notices.

(iii) Particulars required to be registered in other registers maintained by the local authority, such as the advertisements register and the register of planning applications under the Town and Country Planning Act, 1947, and the registers to be maintained under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949 (*m*).

(iv) Special rights exercised under specific statutory powers, such as sections 6 and 7 of the Atomic Energy Act, 1946 (*n*).

Provision might also be made for the registration in the local land charges register of certain miscellaneous matters affecting the land within the special knowledge of the local authority, such, for example, as a statement as to the sewering of the property, any street numbering or naming orders that may have been made, details of any habitation certificate that may have been given under the Council's building bye-laws, and a statement as to whether the roads abutting on the property are highways repairable by the inhabitants at large.

2. Enforceability of Local Land Charges

As explained above, as a general principle, we consider that section 198 of the Law of Property Act, 1925, and section 15 (1) of the Land Charges Act, 1925, should be clearly applied to all charges registrable in the local land charges register, in order that the purchaser may safely purchase the property free from all such charges that are not registered.

Some charges, however, will be enforceable indirectly against the owner for the time being, although the same are registrable and yet are not registered. Under the Public Health Act, 1936, s. 291, a local authority that has incurred expenses under the Act in respect of the property, will have a charge on the land, which will be registrable, and which charge will not be enforceable as such against a purchaser for

(*l*) As, *e.g.*, in the case of a requisitioning notice; see *Lewisham Corporation* v. *Maloney*, *supra*.

(*m*) It is submitted that the need for the maintenance of these and other statutory registers should be examined; the register required under s. 13 (2) of the Private Street Works Act, 1892, might well be abolished.

(*n*) See article by the present writer in the *Conveyancer and Property Lawyer*, Vol. 12, at pp. 54 and 55.

value if it is not duly registered. In addition to the charge, the authority may recover the expenses by serving a fresh demand on the owner for the time being of the land affected (*o*). Similarly, a demolition order made under section 11 of the Housing Act, 1936, is registrable in the local land charges register by reason of the restriction imposed under section 155 of the same Act, but non-registration of the order could not affect the duty of a subsequent purchaser, being the owner for the time being, to demolish the house under section 13 of the Act, or the duty of the local authority to act in default. It is submitted that these ancillary remedies of the local authority should be abolished, thereby making the register conclusive and comprehensive.

3. The Registers

Local land charges registers are at present maintained by most (if not all (*p*)) local authorities in England and Wales, including the county councils, but excluding the parishes. A recent editorial note in the *Conveyancer and Property Lawyer* (*q*) has suggested, on the grounds of convenience to practitioners, that all local land charges should be registered at the Central Land Charges Registry. The request seems reasonable enough on first consideration, but it should be remembered that the local registers have a great advantage over the central register, in that in the former case, charges are registered against particular properties, whilst at the Central Registry charges are registered against estate owners (*r*).

Some simplification of the present system in the interests of private practitioners does, however, seem to be possible. At present, outside the county boroughs, where one search only is necessary, a search has to be made in the register maintained by the county district (*i.e.*, non-county borough, urban district or rural district) council, and also in that maintained by the county council. There seems to be no logical reason for the continuance of the county council registers, as all charges enforceable by or on behalf of the county councils could readily be registered in the appropriate county district council register. County council charges are comparatively few in number, consisting mainly of certain agricultural charges at present registrable in Part V of the register, and charges relating to main roads under the former Restriction of Ribbon Development Acts, and now enforceable under the Town and Country Planning Act, 1947.

The number of parts of the register as they at present exist also is in need of revision. The practice has grown in recent years of creating a new part of the register for each new charge created under

(*o*) In such circumstances the authority will be able to sue on the demand as for a simple contract debt, and will not have the special remedies (*e.g.*, those given by s. 121 of the Law of Property Act, 1925), usually vested in a chargee under these local government statutes. In practice, however, the remedy of a simple action is usually quite effective.

(*p*) There is actually no statutory requirement making the maintenance of a register obligatory on a local authority, but as the registering authority has normally a vested interest in the enforcement of registrable charges, the register becomes a *sine qua non*.

(*q*) Vol. 13, for June, 1949, at p. 245.

(*r*) Where charges are registrable against estate owners only, a prospective purchaser may be affected with notice of a charge registered against a person against whom he could not search, not having had the opportunity of perusing an abstract of the title to the property (see, *e.g.*, *Re Forsey and Hollebone's Contract*, *supra*, and *White* v. *Bijou Mansions, Ltd.*, [1938] Ch. 351).

a statute. The four pre-war parts have now grown in this fashion to ten. We would suggest, with a little re-drafting of the prescribed forms for the Schedules to the Official Certificates of Search, that the number of parts could be reduced to not more than six. Parts I to IV could be left as they are at present (*s*), Part V should cover the charges, all created under special statutes, at present registered in Parts V to X inclusive, and a new Part VI should be created for the miscellaneous charges and information which it is suggested should be registered in paragraph 1 (c) of the present article.

4. Summary

If we might venture to follow the usual practice of reports of departmental committees and the like, the recommendations put forward in this article for reform may be summarised as follows :—

(a) There should be a clarification of which matters arising under the Town and Country Planning Act, 1947, are registrable, and, in particular, whether conditions in planning permissions are to be so treated.

(b) Charges at present registrable in Parts V to X inclusive should be made local land charges properly so called, and subjected to the procedural code of the Local Land Charges Rules, 1934.

(c) A consolidated edition of the Local Land Charges Rules, 1934, should be issued, incorporating all amendments.

(d) Other statutory charges on land, and miscellaneous information affecting particular parcels of land, should be made registrable in the local land charges register, but these charges need not be made unenforceable against a purchaser in the event of non-registration.

(e) The need to maintain other statutory registers by a local authority affecting land should be examined.

(f) Where charges are unenforceable in default of registration, it should not be open to the local authority to achieve the same object by another method; *e.g.*, by serving a demand on the owner of the land for the time being.

(g) The local land charges registers at present maintained by county councils should be abolished, and the charges at present therein registered, made registrable in the relevant county district council registers.

(h) The present divisions of the register into ten parts should be revised, so as to reduce the number of parts to six.

(*s*) Subject to the clarification of the point mentioned in footnote (*b*), *supra*.

A NOTE ON AGRICULTURAL TENANCY AGREEMENTS

By J. Muir Watt, M.A., Barrister-at-Law

The precedent of an agricultural tenancy agreement printed in the *Conveyancer and Property Lawyer*, Vol. 12, pp. 369 to 382 (June, 1948) was framed in accordance with the Agriculture Act, 1947. It is, however (subject to the alteration of a few references), a valid precedent for use under the Agricultural Holdings Act, 1948, which, as a consolidating Act, made no new law. A note on the references which should now be substituted for those in the precedent as printed is given below.

Clause 3 (5) provides for a right of holdover, in a Michaelmas tenancy, until March 25 following the termination of the tenancy. It might be suggested that a holdover of this length would cause undue hardship and loss to an ingoing tenant. The outgoer might decide not to thresh his corn until after Christmas, with the result that the ingoer would have no straw with which to feed or bed down his cattle in the yards. Again, he is deprived of the use of the barn for a considerable period. When the holdover ended in the spring the ingoer would find that he had a large amount of straw left on his hands which would be relatively useless. For these reasons it might be preferable to substitute December 25 for March 25. This gives the outgoer a reasonable chance to thresh and market his corn, without putting the ingoer to such serious inconvenience. A holdover of this restricted duration is more in accordance with present-day agricultural ideas. If this suggestion is adopted there will have to be a consequential alteration in clause 3 (14A).

Some readers may be interested to know that a useful model of an agricultural tenancy agreement, suitable for a smallholding, is set out *in extenso* in the Schedule to the Smallholdings (Management) Regulations, 1949 (SI 1949, No. 1801; price 3d.). It is not often that one can purchase a valuable precedent from the Stationery Office for the modest price of 3d.! The precedent contained in the Schedule, which has the official blessing of the Ministry of Agriculture, is on much the same lines as the precedent in the June, 1948, *Conveyancer*.

The following alterations will suffice to adapt the latter precedent to the requirements of the Agricultural Holdings Act, 1948.

Clause 3 (1)	...	Substitute "Agricultural Holdings Act 1948" for "Agricultural Holdings Acts 1923 to 1947".
Clause 3 (3) (ii)	...	Substitute "Agricultural Holdings Act 1948" for "Agriculture Act 1947".
Clause 3 (6)	...	Substitute "section 50 of the Agricultural Holdings Act 1948" for "section 24 of the Agriculture Act 1947".
Clause 3 (9)	...	Substitute "Agricultural Holdings Act 1948" for "Agriculture Act 1947".

Clause 3 (12)	...	Substitute "Agricultural Holdings Act 1948" for "Agricultural Holdings Acts 1923 to 1947".
Clause 4 (9)	...	Substitute "Part II of the Fourth Schedule to the Agricultural Holdings Act 1948" for "Part II of the Fourth Schedule to the Agriculture Act 1947".
Clause 13 ...	...	Substitute "section 16 of the Agricultural Holdings Act 1948" for "section 32 of the Agricultural Holdings Act 1923".

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

Contract for sale—Agent's commission—property sold before introduction.—E. P. Nelson & Co. v. *Rolfe,* [1949] 2 All E. R. 584, carries the law of agent's commission one stage further. Here the contract provided for payment if the agents introduced a person "able ready and willing to purchase", which they did, though before the date of such introduction the vendor gave an "option" to purchase to another person which was later completed by a contract. The Court of Appeal held, upon the principles of *Luxor (Eastbourne), Ltd.* v. *Cooper,* [1941] A. C. 108, that the agents could recover commission because they had fulfilled the terms of their contract and there was no implied term that the introduction should be made before some other purchaser had been introduced. The point was, of course, that the agents had not been notified after earlier introduction.

Once again we should point out that this case turns upon the terms of the contract. The Court was not prepared to imply a term and in the absence of any term the agents were entitled to continue to search for a purchaser and recover their commission for any successful effort. In fact, of course, these contracts vary a good deal, so we believe, and probably are not enough read until some question arises—but in this particular case there was earlier authority for the decision: see note on *Dennis Reed, Ltd.* v. *Nicholls,* [1948] 2 All E. R. 914 (*ante,* p. 216). It is proper to point out that in the instant case the property had not been sold—the option only represented a possibility of sale which in this case matured.

Implied grant of a right under Law of Property Act, s. 62—use of a coal shed.—Attention may be called to the judgment of Jenkins, L.J., in *Wright* v. *Macadam,* [1949] 2 All E. R. 565 (noted *ante,* p. 391). A tenancy agreement under hand was held to include an implied grant of the right to use a coal shed by virtue of the Law of Property Act, s. 62, notwithstanding that previously to the grant the use had been enjoyed by

permission of the landlord. There is no new law in the incorporation of a right enjoyed by permission: *International Tea Stores* v. *Hobbs,* [1903] 2 Ch. 165; *Lewis* v. *Meredith,* [1913] 1 Ch. 571 provided that the right is one capable of lying in grant: *Burrows* v. *Lang,* [1901] 2 Ch. 502; *Bartlett* v. *Tottenham,* [1932] 1 Ch. 114. The particular interest lies in the character of the right so impliedly incorporated in the grant, because it must be remembered that this right would be implied equally in the grant of a fee simple unless express words were used to exclude it, or subsequently and only in appropriate circumstances where the conveyance was rectified to exclude them.

The learned Judge (at p. 571) said: " the right was . . . a right to use the coal shed in question for the purpose of storing such coal as might be required for the domestic purposes " of the premises let. He then went on: " In my judgment, that is a right or easement which the law will clearly recognise, and it is a right or easement which could readily be included in a lease or conveyance by the insertion of appropriate words in the parcels ". It is to be noted that the learned Judge did not lay down that the right was an easement, but he did not indicate what other form of proprietary right within the purview of the law of Real Property it could be. The difficulty, as we see it, is to determine the precise character of the grant. It is not suggested, presumably, that it was the exclusive right to use the shed or any part of it and clearly the amount of coal to be stored at any time must vary: for the difficulties of treating a right to stack coals as an easement see *Gale* (11th ed.), pp. 60–61. There seems to be ground for thinking that this decision may be important in extending the law of grants of rights analogous to easements.

Town and Country Planning—basis of assessment for compulsory acquisition.—Although *Sampson's Exors.* v. *Nottinghamshire C. C.,* 65 T. L. R. 376, was concerned with the basis of assessment where a notice to treat was served after January 7, 1947, and before the Appointed Day (July 1, 1948), it would seem that it is equally applicable to acquisition after the Appointed Day. By section 55 (3) of the Town and Country Planning Act the land acquired before the Appointed Day but after January 7, 1947, shall be assumed to be " subject to a permanent restriction prohibiting the carrying out thereon of any development other than development of the classes described in the Third Schedule ". By section 52 (2), which applies generally, the value shall be ascertained on the assumption that no planning permission would be granted except a planning permission for the uses specified in the Third Schedule. Notwithstanding the variation of language we think that these two provisions must have the same effect.

The land compulsorily acquired was used at all material times for agricultural purposes and had no buildings upon it, but it was adjacent to land with buildings upon it. Before January 6, 1947, it had substantial value as building land, and it was adjacent to land whose buildings might suffer loss of amenity if it were built upon. The agricultural value was agreed at £17. A Divisional Court (Goddard, L.C.J., Birkett and Lynskey, JJ.), held that the compensation payable was £17, since the absence of buildings prevented its use for any purpose other than the restricted use of agricultural purposes and this restriction was to be treated as permanent. It was argued that a sum should be added in respect of what the owner of neighbouring property would have paid to preserve amenity, but this contention was rejected on the ground that the land must in any case be treated as if it would remain agricultural land and therefore there could be no loss of amenity. Of course the " amenity value " need not be ignored

in all cases because in some cases development within the Third Schedule would be available: see Lynskey, J., at p. 378. But it would seem that even here the loss of amenity would be limited to any possible loss for the particular type of development within the Third Schedule.

It was also argued that there might be an additional value due to the wish of one of the adjoining owners to incorporate the land within the curtilage of his dwelling-house. This, it was argued, did not amount to a development and therefore it was not excluded by the permanent restriction: see section 12 (2) (*d*), which requires no planning permission for the use of any buildings or other land within the curtilage for any purpose incidental to the enjoyment of the dwelling-house as such. It was held that to incorporate agricultural land within the curtilage would be to change the use.

The importance of this decision is twofold. First, and most importantly, it emphasises the changed character of the interest in land. The owner of land does not enjoy the *right* even to anticipate the possibility of a planning permission, at least so far as compulsory acquisition is concerned. This is, of course, a reversal of the old position and a mark of the greatest changes of the Act. Although the decision does not go beyond the position in the case of compulsory acquisition, it should be pointed out that the Central Land Board has asserted that it is prepared to enforce this aspect of the law in sales arising independently of compulsory acquisition by local authorities by buying in property sold above the " permitted " or " existing " use value. Such a policy makes it clear that the fee simple is primarily in the existing " use " and not in that use plus the possibilities of other uses.

The other aspect of the decision is to emphasise the problem of development charge. If the incorporation of a piece of agricultural land into a curtilage operates as a material change of use then a planning permission is necessary. As it is argued that the value of the land is enhanced by the possibility of being incorporated, so a development charge will normally become payable. This will apparently apply whether the land is bought for the purpose or is merely an extension of the garden premises into land already owned by the householder.

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2. *CHARITIES*

Gift to hospital—will and settlement taking effect before the National Health Service Act, 1947.—*Re Gartside,* [1949] 2 All E. R. 547, was a case decided in the Palatine Court of Lancaster. A testator had, subject to a life interest, given part of his residuary estate to a non-teaching and a teaching hospital respectively. The testator had died in 1904. In 1901 he had made a settlement the funds of which in the events which happened became payable to the trustees of the will to hold upon the same trusts. Sir Leonard Stone, V.-C., held that both funds were under section 60 of the Act held upon trust to devote to the two hospitals. It should be noted that in this case the property had already become subject to the trusts for the hospitals and proceedings could have been brought against the trustees because the estate had been fully administered and it was really on this ground that the judgment of Harman, J., in *Re Kellner's Will Trusts* (noted *ante,* p. 377), and now reversed, was distinguished.

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3. *WILL CASES*

By A. K. R. Kiralfy, LL.M., Ph.D., of Gray's Inn, Barrister-at-Law

Will—formalities—soldier's will—Wills Act, 1837, *s.* 11.—*Re Spicer,* [1949] 2 All E. R. 659; 65 T. L. R. 590, follows *Re Stable,* [1919] P. 7 in holding that a deliberate expression by a soldier of his wishes as to the disposition of his property will operate as a will, even though he did not realise he was making a will. The soldier had taken out his Army paybook and stated that the defendant was to have "everything". The witnesses were under the impression that he had filled in a form of will in this paybook but this was impossible to prove, as the book was never found. The defendant was held entitled to the sums due the deceased.

(Theobald, 47.)

Will — ademption — statutory conversion — effect of codicil.—In *Re Viscount Galway's Will Trusts,* [1949] 2 All E. R. 419, is another in the fatal chain of hard cases recently referred to in the *Conveyancer* (vol. 13, p. 362). A testator left shares in a colliery to X and the residue to Y. In 1938 the Coal Act treated the owners of coal as having entered into a contract to sell the coal at a price to be ascertained by valuation. The testator executed a codicil in 1941 and died in 1943. Harman, J., held that the gift of shares was adeemed when converted by statute into an interest in the compensation to be arrived at. Y therefore took this interest, not X. The learned Judge did not find himself able to use the subsequent codicil as a means of preventing ademption. In distinguishing the recent cases on statutory trusts for sale which followed that course (*e.g., Re Harvey,* [1947] Ch. 285; 13 Conveyancer 366), Harman, J., treated the provision of the 1925 legislation as a "conveyancing device" which should not affect substantive rights whereas here there was a "real statutory disappropriation".

(Theobald, 128.)

Administrator—occupation of land—Limitation Act, 1939, *s.* 19 (1) (*b*). —In *Re Howlett,* [1949] 2 All E. R. 490, Danckwerts, J., in effect confirmed the state of the law set out in 13 Conveyancer 276. An administrator occupied, rent free, land, which belonged to his son, from 1927–1944. He was compelled to account for an occupation rent of the land for that period, less proper expenses. The action was not barred because he was treated as having received and retained the profits of the land for that period. He might have pleaded the Limitation Act had he in good faith misapplied the rents or wrongly paid the rents to other parties, but could not plead his own wrong, that no income had in fact been obtained.

Construction—words—"grandchildren"—used in special sense—consistent construction elsewhere.—Re Davidson, [1949] 2 All E. R. 551, turned on a will in which a testatrix first named certain relatives, describing them as grandchildren, who were not such in fact, and then left the residue of her estate to "grandchildren" as a class. It was held that the testatrix,

by " grandchildren " meant to include those relatives, using the testatrix's own " dictionary ". It was emphasised that there is, however, no hard and fast rule that such descriptions must always be generalised throughout the provisions of the will. *Re Cozens,* [1903] 1 Ch. 142, was followed.

(Theobald, 241, 243.)

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4. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—certificate from county agricultural executive committee—death of farm worker contemplated by certificate—identity of individual farm worker immaterial to validity of certificate.—Harris v. *Rowley,* [1949] 2 All E. R. 524, is a logical application of the decision in *Pickford* v. *Mace,* [1943] K. B. 623. *Pickford* v. *Mace* decided that a certificate issued by a county agricultural executive committee under para. (*g*) (ii) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, need not specify a particular agricultural worker by name, and that it was immaterial that no particular individual was in contemplation. The matter which concerns the committee is whether the agricultural holding is in need of an agricultural worker of a particular kind. In *Harris* v. *Rowley* a particular individual *was* in contemplation at the time the certificate was granted but this individual died after the certificate was granted and a different individual had been engaged to do the work by the time an application was made to the Court for possession. The certificate did not mention any individual by name but it certified that " a general farm worker . . . is employed " (not " is or is to be employed ") and it was clearly framed on the assumption that there was a particular individual doing the work at the time of the grant for whose use the farm cottage in question was sought. The Court of Appeal held, affirming the County Court Judge, that the certificate was effective for the purpose of the application for possession. The identity of the individual worker was not a material part of the certificate.

(Rent Restrictions Guide, 3rd ed., p. 90.)

Rent Restrictions Acts—standard rent not determined by the rent paid by occupying sub-tenant if sub-tenancy is unlawful at the material date.—It has long been established law that if at the material time for determining the standard rent there is both a head tenancy and a sub-letting of the whole house, the standard rent is determined by the rent payable by the occupying sub-tenant: *Glossop* v. *Ashley,* [1922] 1 K. B. 1. The Court of Appeal have now made it clear in *Edgware Estates, Ltd.* v. *Coblentz,* [1949] 2 All E. R. 526, that this rule does not apply if at the material time the sub-letting is unlawful, as in the case of a sub-letting in breach of covenant. In this case at the material time, September 1, 1939, there were in existence a head tenancy at a rent of £300 per annum and a sub-tenancy at a rent of £225 per annum. The sub-tenancy was in breach of a covenant in the head-lease. In 1943 this breach of covenant was in fact waived by the landlords, but the Court held that this waiver had no retroactive effect for the purpose of determining the standard rent. The

standard rent was, therefore, £300, the rent reserved by the unlawful sub-letting being ineffective to determine the standard rent. The case had the unusual feature of the rent reserved by the sub-letting being smaller than the rent reserved by the head-lease, but of course this does not affect the principle.

The opposite decision would obviously have produced some strange results. A landlord who had taken the trouble to protect himself by a covenant against assignment or under-letting without consent might have had the standard rent determined against him by a sub-letting of which he was ignorant and which was a breach of the covenant in question.

(Rent Restrictions Guide, 3rd ed., p. 47.)

Rent Restrictions Acts—purported surrender of possession by statutory tenant—wife and furniture left in dwelling-house—revocation of wife's authority to occupy — possession not effectively surrendered.—In *Old Estates, Ltd.* v. *Alexander,* [1949] W. N. 431, the question was whether a statutory tenant had effectively given up possession by quitting the dwelling-house himself and revoking his wife's authority to occupy it (matrimonial disputes having occurred between them), but leaving his wife in actual occupation, together with the furniture. The Court of Appeal, reversing the County Court Judge, held that he had not given up possession. The gist of the Court's decision was that the revocation of his wife's authority to occupy was not in itself sufficient to effect a surrender of possession. Bucknill and Denning, L.JJ., expressed doubts as to whether the husband *could* validly revoke his wife's authority to occupy the dwelling-house in the circumstances, but the true *ratio decidendi* of the case appears more clearly in the judgment of Somervell, L.J., who pointed out that the fact of the furniture remaining in the house was sufficient to prevent the husband from being able to establish that possession had been surrendered. It was, he said, unnecessary to decide what would be the position if the husband had cleared the flat of furniture, but the wife had insisted on remaining there despite a revocation of her authority to do so. It has been generally believed, and it is in accordance with *Taylor* v. *McHale* (1948), 151 Estates Gazette 371, and a reported county court decision, *Weight* v. *Gill* (1948), 92 S. J. 387, that if a husband removes the furniture and revokes his wife's authority to occupy, he thereby effectively surrenders possession, even if his wife remains on the premises. She would then be a trespasser.

(Rent Restrictions Guide, 3rd ed., p. 104.)

Rent Restrictions Acts—prohibition of premiums—excessive price for furniture—application to dwelling-house let for the first time—section 8 of 1920 Act and section 9 of 1923 Act.—The case of *Minns* v. *Moore,* [1949] W. N. 416, settles rather late in the day a point which has been in doubt in regard to section 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It is rather late in the day because both the provisions concerned in the case, section 8 of the 1920 Act and section 9 (1) of the 1923 Act, have been repealed by the Landlord and Tenant (Rent Control) Act, 1949, and the point cannot now arise save in the few cases of rights accrued before the repeal. The doubtful point was, of course, whether the prohibition of premiums contained in section 8 of the 1920 Act applied in the case of the first letting of a dwelling-house which had

previously been owner-occupied. The doubt arose because of the definition of a dwelling-house in the Acts as a house or part of a house let as a separate dwelling. A house which is about to be let is not "let" as a separate dwelling. The Ridley Committee in their 1945 Report (para. 140) recommended that "'dwelling-house' should include a house about to be let so as to make it clear that it is an offence to charge a premium in respect of a letting of such a house". The Court of Appeal have decided, in the above case, that for the purpose of section 8 of the 1920 Act (and consequentially for the purpose of section 9 (1) of the 1923 Act) "dwelling-house" need not mean a dwelling-house which was at the particular point of time in question actually let as a dwelling-house. They, therefore, held that the tenant could recover an excessive amount paid for furniture as a condition of the grant of a tenancy.

As mentioned above, the point is now mainly of historical interest. It would appear that the somewhat cumbersome wording of section 2 (3) of the Landlord and Tenant (Rent Control) Act, 1949, is designed to prevent a similar question arising upon the construction of that section.

(Rent Restrictions Guide, 3rd ed., pp. 72–77.)

Rent Restrictions Acts—premium payable on the grant of a lease—term of fourteen years or upwards—lease beginning from a date prior to its execution—antecedent negotiations—premium not illegal.—It is curious that a number of decisions have recently been given on doubtful points under provisions of the Rent Acts which have been repealed by the Landlord and Tenant (Rent Control) Act, 1949. The decisions are, therefore, now mainly of historical interest. *Colton* v. *Becollda Property Investments, Ltd.*, [1949] W. N. 429, decides such a point on the application of section 8 (3) of the 1920 Act, which provides that the prohibition of premiums on the grant of a tenancy does not apply to "the grant, renewal or continuance for a term of fourteen years or upwards of any tenancy". In that case there had been somewhat protracted negotiations for the grant of a fourteen years' lease at a premium to the sitting tenant of a rent-controlled dwelling-house. During the negotiations the payment of a premium of a certain amount was required as a condition of the grant of a tenancy. The lease, when eventually executed, was made to begin from the date when this requirement was laid down. The term of fourteen years thereby granted was, therefore, expressed to begin from a date more than three months before the date of the execution of the lease. The tenant, having repented of his bargain, tried to argue that the term was for less than fourteen years, and that, accordingly, the premium had been illegally exacted and should be returned. The Court of Appeal, affirming the County Court Judge, held that the premium was not illegal. The condition in the lease as to the premium related back to the date when the premium was required in the course of the negotiations. The effective requirement had, therefore, been made before the fourteen years had started.

It is clear that this decision would not apply in a case where the commencement of the fourteen years' term was ante-dated purely and simply in order to evade section 8 (3). The point cannot, of course, occur in the future, since section 8 of the 1920 Act has been repealed by section 2 (7) of the Landlord and Tenant (Rent Control) Act, 1949.

(Rent Restrictions Guide, 3rd ed., pp. 72–77.)

Rent Restrictions Acts—alternative accommodation—entertainment of business associates—garden for child to play in—suitability of accommodation.—In *De Markozoff* v. *Craig* (1949), 93 S. J. 693, the tenant objected to the alternative accommodation offered him by the landlord on the grounds (a) that he would be unable to entertain his business associates there, which he required to do to promote business and was in the habit of doing in his present accommodation, (b) that the alternative accommodation lacked a garden in which his small child could play as at present. The County Court Judge took both matters into consideration and dismissed the landlord's action for possession. The Court of Appeal held that he was entitled to take these factors into account. The Master of the Rolls pointed out that the entertainment of the tenant's guests was a domestic activity, notwithstanding the fact that they were his business associates. Such entertainment was not a business activity. This is sufficient to distinguish the case from such authorities as *Middlesex County Council* v. *Hall,* [1929] 2 K. B. 110. The relevance of the garden is perhaps more difficult to justify in view of the decision in *Briddon* v. *George,* [1946] 1 All E. R. 609, that the absence of a garage could not properly be taken into account. The distinction between a garden and a garage is a little artificial.

(Rent Restrictions Guide, 3rd ed., pp. 83–85.)

Rent Restrictions Acts—meaning of " the tenant and his family " in section 3 (3) of the 1933 Act—married sons and their wives members of the tenant's family.—In *Standingford* v. *Probert,* Estates Gazette, November 12, 1949, 423, further consideration was given to the flexible term " family ", which occurs in section 3 (3) of the 1933 Rent Act, as well as in section 12 (1) (*g*) of the 1920 Act. In the present case the question was whether the tenant's two married sons and their wives, who were living with the tenant, came within the meaning of " family " in the expression " tenant and his family " in section 3 (3). The Court of Appeal, reversing the County Court Judge, held that they did, the result being that the alternative accommodation offered by the landlord was not suitable since it was insufficient to meet the needs of the tenant's family as thus defined. It has previously been decided that " family " includes, as well as wife and children, the tenant's husband, brothers and sisters, and, it would seem, adopted and possibly step-children and illegitimate children (*Brock* v. *Woolams,* [1949] 1 All E. R. 715). Asquith, L.J., pointed out in the present case that when a son became the head of a new family he did not necessarily cease to be a member of the original family. The fact that a man became his wife's husband did not mean that he ceased to be his mother's son.

(Rent Restrictions Guide, 3rd ed., p. 84.)

Rent Restrictions Acts—dwelling-house let at an inclusive rent—transfer of liability for rates to tenant—meaning of " corresponding reduction " in rent—amount of rates payable at date of transfer—method of calculation. —In *Woodside House (Wimbledon), Ltd.* v. *Hutchinson,* [1949] 2 All E. R. 709, the landlords, who had hitherto been responsible for the payment of rates, decided to transfer the burden of the rates to the tenant and served a notice upon him to that effect, thus attracting the proviso to section 2 (3) of the 1920 Act—" provided that, for the purposes of this section, the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made

in the rent". At the date of the transfer of liability the rates payable amounted to £61, this being £20 more than the amount payable in 1939; the landlords, however, had never served any notices increasing the standard rent by the amount of the increase in rates. The point now arose as to what the "corresponding reduction" should be in the rent to satisfy the proviso to section 2 (3). The Court of Appeal held that the reduction must be £61, the amount of the rates payable at the date of the transfer of liability. This, however, was not the end of the story—if it had been, the landlords would have suffered a permanent loss of £20 by reason of their failure, prior to the transfer, to serve notices of increase in the standard rent on account of the increase in rates. True, it was no longer open to the landlords to serve such a notice, since after the transfer they were not liable to pay the rates. It was, however, open to them under the general provisions of the Acts to bring the rent up to the standard rent if it had fallen below it. The standard rent was £190. As at the date when the standard rent was fixed the landlord paid £41 in rates, the net standard rent was £190 minus £41, or £149. The result was that, although the rent must be reduced to £129 (£190 minus £61) to satisfy the proviso to section 2 (3), the landlords could, on taking proper steps, bring it up to £149. The Court explained that by "proper steps" they meant serving upon the tenant a clear and unequivocal demand—there is no statutory form of notice prescribed.

This decision must not be understood as undermining in any way the statutory provisions about notices of increase on account of rates. So long as rates are "payable by the landlord" he can only increase the rent on account of an increase in the rates if he serves the tenant with a notice which complies with the statutory requirements.

This conception of "net standard rent" clearly cannot be extended in such a way as to apply to outgoings other than rates, although the Court of Appeal has not formulated the principle of distinction very clearly. Suppose that in 1939 the standard rent is £250, the landlord being under a liability to repair which at 1939 prices costs him £20 a year. In 1949 repairs cost £40 a year. Repairing liability is transferred in 1949 to the tenant and the rent is reduced by £40 to £210. It is obvious that the provisions of the Act would be defeated if the landlord could thereupon increase the rent to £230 in order to restore the "net standard rent" to what it was in 1939. It would appear that the Court has stated the proposition about "net standard rent" too widely.

Incidentally the County Court Judge in this case put a novel construction upon the proviso to section 2 (3), which, if it had been held to be correct, would have struck alarm and despondency into the hearts of landlords. He considered that the "corresponding reduction" had to be ascertained at the end of each year, so that the net adjusted rent plus the actual rates for the year amounted to the standard rent. If this were correct the landlords would always suffer the loss if rates went up. Fortunately for landlords this view did not prevail.

(Rent Restrictions Guide, 3rd ed., p. 55.)

Rent Restrictions Acts—standard rent—date at which premises were last let as a dwelling-house—intervening period of business user—standard rent the rent previously payable for dwelling-house purposes.—Mitchell v. *Barnes,* [1949] 2 All E. R. 719, settles a point which had been left open in *MacMillan & Co., Ltd.* v. *Rees,* [1946] W. N. 88; 52 T. L. R. 331. The dwelling-house in this case was subject to 1939 Act control. From 1929 to

1935 it was let as a dwelling-house at £80 a year. From 1935 to 1946 it was let as offices. In 1947 it was again let for residential purposes, this time as two separate flats, at rents of £156 and £130 a year respectively. Certain alterations had been made but these did not destroy the identity of the original dwelling-house. The Court of Appeal held, affirming the County Court Judge, that the rents properly payable for the two flats were not those at which they were first let in 1947, but apportioned parts of £80, the rent at which the premises had been let as a dwelling-house from 1929 to 1935. This was the rent at which the premises had been "last let" as a dwelling-house before September 1, 1939. The intervening business user should be ignored altogether. The change of user to business purposes which occurred in 1935 did not effect any change in the identity of the dwelling-house for the purposes of the Acts. The period of business user was just as irrelevant as if the house had been empty or let furnished for that period.

(Rent Restrictions Guide, 3rd ed., p. 63.)

Rent Restrictions Acts—premises let partly for business purposes and partly for residence—letting only in a very minor degree for residence—tenant sleeping in one room two nights a week—tenant protected by the Acts.—The case of *Green* v. *Coggins,* [1949] W. N. 418, illustrates in a striking way how favourable to the tenant is the construction which the English Courts have placed upon proviso (ii) to section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which says that "the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes". The English Courts have here taken a very different line from the Scottish Courts, as the case of *Pender* v. *Reid,* 1948 S. C. 381, shows. In *Green* v. *Coggins* the premises let to the tenant comprised a large assembly hall, a dining room, stage and supper room used as a café during the day, cloakrooms and three upper rooms. At first the tenant lived in the three upper rooms with his family. Subsequently, however, he purchased a dwelling-house half-a-mile away, and lived there most of the time with his family. He continued to keep one room in the original premises for residential purposes, sleeping there on the average two nights a week when his work kept him late. All the rest of the premises were used for business purposes. His landlords brought proceedings for possession and the tenant pleaded that he was protected by the Acts. The County Court Judge upheld this contention and the Court of Appeal affirmed his decision. It was clear from *Langford Property Co., Ltd.* v. *Tureman,* [1949] 1 K. B. 29, that the fact that the tenant had another home was not in itself a reason for refusing him protection. Here, however, not only had he another home, but the part of the premises used for his intermittent residential purposes was a very minor part of the whole. This decision confirms beyond doubt that the English Courts reject *in toto* any doctrine of dominant user. Evidently the "part" of the premises which may be used for business purposes without forfeiting the protection of the Acts may be by far the greater part. Is there any limit to this? Possibly the part retained for residential purposes must not be so small that it would attract the *de minimis* principle, but short of this there appears to be no limit. The point deserves the attention of the legislature when the law on this subject is consolidated.

(Rent Restrictions Guide, 3rd ed., p. 25.)

Rent Restrictions Acts—Housing (Rural Workers) Acts—cottage within both series of Acts—Rent Restrictions Acts not excluded.—Black Mill, Ltd. v. *Straker,* of which the only report available at the time of writing is in the *Estates Gazette* of November 19, 1949, p. 447, is an important decision on the relation between the Rent Restrictions Acts and the Housing (Rural Workers) Acts. It justifies the doubts which have been expressed about the correctness of the decision in *Roberts* v. *Jones,* [1947] K. B. 221, that the Rent Restrictions Acts were not intended to apply to houses the rent of which had been fixed by the Housing (Rural Workers) Acts. It is now decided that the Rent Restrictions Acts are not excluded by reason of the fact that a dwelling-house is also subject to the Housing (Rural Workers) Acts. The decision raises some interesting issues, and fuller comment must await a more detailed report. One point which appears to arise is the effect of the decision upon the interpretation of section 1 (7) (*b*) of the Landlord and Tenant (Rent Control) Act, 1949.

(Rent Restrictions Guide, 3rd ed., p. 47.)

Covenant not to assign without consent—expressed to bind tenant and his successors in title—trustee in bankruptcy bound by covenant.—In *Re Wright,* [1949] 2 All E. R. 605, Danckwerts, J., held that a covenant not to assign without consent which was expressed to bind the tenant and his "successors in title" was binding on the tenant's trustee in bankruptcy. The case of *Doe d. Goodbehere* v. *Bevan* (1815), 3 M. & S. 353, was distinguished on the ground that the word "assigns", which was there used, connoted voluntary assigns and not assigns by operation of law, whereas the expression "successors in title" was wide enough to include involuntary as well as voluntary assigns. In resting his decision on this ground Danckwerts, J., avoided having to determine whether *Doe d. Goodbehere* v. *Bevan* was affected by the policy underlying the modern Bankruptcy Acts. The latter decision, therefore, remains a good authority in cases where the covenant can be interpreted as intended to apply to voluntary assigns only.

(Woodfall, 24th ed., p. 866.)

Landlord and Tenant Act, 1927, *s.* 19 (1)—*covenant not to assign without landlord's consent—provision that "such consent will not be withheld in the case of a respectable and responsible person"—the word "unreasonably" not to be read into the provision.*—In *Moat* v. *Martin* (1949), 65 T. L. R. 660, a lease contained a covenant by the tenant not to assign or underlet without the landlord's consent, followed by the words, "Such consent will not be withheld in the case of a respectable and responsible person". The tenant, without obtaining the landlord's consent, assigned to a person who was admittedly respectable and responsible. The landlord thereupon brought an action to enforce forfeiture of the lease for breach of the covenant not to assign without consent. The County Court Judge held that section 19 (1) of the Landlord and Tenant Act, 1927, compelled him to insert the word "unreasonably" before "withheld". He dismissed the landlord's action, however, because he held that the landlord's refusal was in fact unreasonable. The landlord appealed, but his appeal was dismissed by the Court of Appeal on the ground that section 19 (1) of the 1927 Act did not require the word "unreasonably" to be introduced into a covenant in the above terms. The Master of the Rolls took the view that the words "Such consent will not be withheld in the case of a respectable and responsible person" could be looked at in either of two ways.

If these words amounted to a positive covenant by the landlord not to withhold consent in the case of a proposed assignment to a respectable and responsible person, then section 19 (1) did not apply, since they only applied to a covenant by the tenant not to assign without consent. If, on the other hand, the true construction was that there was no covenant not to assign without consent, in the case of an assignment to a respectable and responsible person, then there was nothing to which section 19 (1) of the 1927 Act could apply. It is submitted that the latter construction is in fact the correct one. Denning, L.J., looked at the matter rather from the point of view of the purpose of section 19 (1). He pointed out that the proviso in the present case was not the contrary of a proviso that the consent should not be unreasonably withheld. It included it and went beyond it. It must be remembered that the primary purpose of the proviso in section 19 (1) is to relieve the tenant against arbitrary action by the landlord. The tenant in the present case needed no such assistance, however, since he was protected by a stronger proviso in the lease. The decision is obviously common sense, but the particular form of words which gave rise to the problem must be rare.

(Woodfall, 24th ed., pp. 579–585.)

Covenant in a tenancy agreement to grant a further term on request containing the same provisions as the present tenancy "including the present covenant for renewal"—not a covenant for perpetual renewal within rule 5 of Schedule XV of the Law of Property Act, 1922.—The provision in rule 5 of Schedule XV of the Law of Property Act, 1922, that any grant after December 31, 1925, of a term with a covenant or obligation for perpetual renewal will take effect as a demise for 2000 years, only applies where the covenant is on the face of it a covenant for perpetual renewal. It does not apply to covenants which on the face of them are covenants to renew once only, even if the renewal is to be on terms which incorporate the covenant to renew itself, so that by means of a series of such covenants the tenancy may in fact be capable of perpetual reproduction. This was held by Harman, J., in *Re Greenwood's Agreement,* [1949] W. N. 397, where the tenancy agreement contained the following clause:—

> "The landlord will on the written request of the tenants made three calendar months before the expiration of the term hereby granted . . . grant to them a tenancy of the said premises for a further term of three years from the expiration of the said term at the same rent and containing the like agreements and provisions as are herein contained, including the present covenant for renewal."

Harman, J., distinguished *Green* v. *Palmer,* [1944] Ch. 328, but it does not appear from the report at present available exactly on what grounds.

(Woodfall, 24th ed., p. 996, and Supplement No. 5, p. 126.)

Taking possession of land by the Minister of Agriculture under Defence Regulation 51 *creates no estate in land in the Minister—Minister has no power to create a tenancy but a contract of occupation only—no tenancy by estoppel owing to ultra vires doctrine.*—It seems strange that it should at this date be argued seriously that the Minister of Agriculture, having taken possession of land which was being farmed badly, could create a legal tenancy of such land. The Minister's rights are possessory only, like those

of local authorities who requisition houses, or like the rights which the Minister acquires when he takes possession under section 18 of the Agriculture Act, 1947, or under section 29 of the Agricultural Holdings Act, 1948. Indeed, it was the possessory nature of such rights which gave rise to the enactment of section 9 of the Agriculture (Miscellaneous Provisions) Act, 1949, which enables the Minister to claim tenant right " as if " he had been in possession by virtue of a contract of tenancy. In *Ministry of Agriculture and Fisheries* v. *Matthews* (1949), 65 T. L. R. 655, it was, however, argued that the Minister, who had taken possession under Defence Regulation 51 had created a tenancy, or, alternatively, that he was estopped from denying that he had created one. The agreement made in that case, which would be properly described as a contract of occupation, was modelled on a tenancy agreement, and indeed, rather unfortunately, used the expressions " tenant " and " tenancy ". When the Ministry sought to recover possession from the occupier he claimed that he was a tenant and was entitled to the proper length of notice which an agricultural tenant should receive. Cassels, J., had no difficulty in showing that the Minister, having himself only possessory rights and not an estate in the land, had no power to create a tenancy. The occupier, however, argued that by creating what purported to be a tenancy the Minister was estopped from denying that a tenancy had been created. If, however, the creation of a tenancy by the Minister is *ultra vires,* to hold that he could create a tenancy by estoppel would be to destroy the whole doctrine of *ultra vires.* Cassels, J., referred to the statement of the position by Lord Greene, M.R., in the unreported case of the *Minister of Agriculture and Fisheries* v. *Hulkin,* where he said:—

> " Accepting the view . . . that the Minister had no power under the regulations to grant a tenancy, it is perfectly manifest to my mind that he could not by estoppel give himself such power. The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the whole doctrine of *ultra vires* if it were possible for the donee of a statutory power to extend his power by effecting an estoppel ".

(Woodfall, 24th ed., pp. 13–17. Supplement No. 5, pp. 3, 4 and 41.)

Agricultural holding—notice to quit by landlord—Minister's consent not obtained under Defence Regulation 62 (4A)*—tenant in fact quits pursuant to notice—right to compensation for disturbance.*—The decision in *Kestell* v. *Langmaid,* [1949] W. N. 415, is now only of historical interest, since the Agricultural Holdings Act, 1923, under which the claim was brought, has been repealed, and Defence Regulation 62 (4A), which gave rise to the point at issue, has been revoked. The decision does, however, settle a point which had been in some doubt, and for this reason is worthy of a brief mention. The point was whether a tenant who had in fact quitted in pursuance of a notice to quit which was void because the Minister's consent under Defence Regulation 62 (4A) had not been obtained, was entitled to compensation for disturbance. The Court of Appeal held that the tenant was entitled to such compensation, applying the principle of *Westlake* v. *Page,* [1926] 1 K. B. 298, where it was held that a tenant who quitted in consequence of a notice to quit, which was invalid because conditional, could claim compensation for disturbance.

It is of some interest to note that the Legislature has specifically provided against a similar difficulty arising under the analogous provision contained in section 30 of the Agricultural Holdings Act, 1948. This section provides that if during the currency of a notice to quit a contract of sale is made

in respect of the landlord's interest, the notice to quit becomes void unless certain notices are given. It is, however, enacted that if the landlord fails to give the notice required of him, and the tenant does in fact quit in pursuance of the notice to quit, the notice is not void. The tenant's right to compensation for disturbance is thus placed beyond doubt.

(Woodfall, 24th ed., pp. 982–983. Supplement No. 5, pp. 116–117.)

Tenant of flat in a block approaching by roadway under control of landlord—tenant an " invitee "—injury from unusual danger—Hart v. *Liverpool Corporation,* [1949] W. N. 412, is really a decision on the law of negligence, but it is of some interest to the landlords and tenants of flats in a block, where the approach roadways or pathways to the flats are under the control of the landlords. The essence of the decision is that a tenant who is on his way to or from his flat by means of a roadway serving the block is an " invitee " and entitled to expect the standard of care from his landlord laid down in *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274, 288. In *Hart's Case* there were in fact two parallel blocks of flats belonging to the defendant landlords facing across a courtyard. The fact that the tenant, who was a tenant of a flat in block A, was returning to her flat by means of a roadway alongside block B was held to be immaterial. Although there was a more direct means of access to her flat by a pathway alongside block A, the roadway beside block B really served both blocks of flats. The landlords' argument, that in using this roadway the tenant was a " licensee " (to whom a smaller duty of care was owed) and not an invitee, failed. This is clearly common sense.

Defence Regulation 68CA*—premises let for professional purposes—innocent misrepresentation—remedies of the parties.*—The case of *Edler* v. *Auerbach* (1949), 65 T. L. R. 645, is remarkable for the number of ways in which the plaintiff put his claim, all of which failed. The facts were simple in essence. Certain premises had been used for residential purposes subsequently to December 31, 1938, thus falling within Defence Regulation 68CA, which provides that " no person shall, except with the consent of the local housing authority, use for purposes other than residential purposes any housing accommodation which has been used for residential purposes at any time since December 31, 1938 ". The defendant let the premises to the plaintiff for professional purposes, the plaintiff taking them on the faith of a representation by the defendant that they had not been used for residential purposes since December 31, 1938. Fraud was not alleged, so that the representation in question must be taken to have been an innocent one. The plaintiff paid the defendant £111, being rent in advance for the first quarter. The plaintiff then discovered that the premises had in fact been used for residential purposes since the material date. He brought an action against the defendant claiming a declaration that the agreement was void, and the return of his £111, on the ground that the agreement was on the face of it illegal. Alternatively, he claimed the £111 on grounds of innocent misrepresentation, mistake of fact, or breach of an implied term that the premises could be used for professional purposes. The defendant counterclaimed for arrears of rent. Devlin, J., held that both the claim and the counterclaim failed. It appeared in evidence, although not pleaded, that the defendant knew before granting the tenancy that the premises had been used residentially since December 31, 1938.

The points of law decided by Devlin, J., were as follows:—

(1) The agreement was not on the face of it illegal, since the professional user would have been perfectly lawful if the housing authority had consented to it. Although the agreement was not unlawful, the defendant intended that the premises should be used unlawfully, and he could not, therefore, enforce the agreement: *Alexander* v. *Rayson,* [1936] 1 K. B. 169, 182. The defendant's knowledge that the premises had been used residentially after the material date had not been pleaded, but it had emerged in evidence. The Court, if satisfied that all the relevant facts were before it, must take notice of the illegality: *North-Western Salt Co.* v. *Electrolytic Alkali Co.,* [1914] A. C. 461. The Court in the present case was so satisfied.

(2) The illegality, however, did not affect the validity of the lease: *Alexander* v. *Rayson, supra,* at p. 184. The plaintiff's claim that the lease was void on this ground, therefore, failed. The defendant's illegality deprived him of the power to enforce the agreement but did not of itself give any right of action to the plaintiff.

(3) As the representation was pleaded as an innocent representation it could at best only give rise to a right of rescission. *Angel* v. *Jay,* [1911] 1 K. B. 666, decided, however, that once a lease has been executed, as in the present case, innocent misrepresentation does not give rise to a right of rescission.

(4) There is no implied warranty that premises are fit for the purpose for which they are let: *per* Parke, B., in *Hart* v. *Windsor* (1843). 12 M. & W. 68, at p. 87. The plaintiff's claim, therefore, failed in so far as based on an implied term that the premises could legally be used for professional purposes.

(5) The plea that the plaintiff had paid money for a consideration that had failed did not succeed, as in fact the consideration had not failed. If any warranty as to use for professional purposes is negatived, the plaintiff got what he bargained for, namely, a valid lease of the premises.

(6) The plea of mutual mistake of fact failed as the mistake was not mutual.

(7) The plea of unilateral mistake failed, as the mistake relied upon, namely, the plaintiff's supposition that the premises had not been used for residential purposes since December 31, 1938, was not the reason for the payment. True, the plaintiff entered the lease under this mistake, but he made the payment because the lease required it. This might appear to be a somewhat narrow view, and Devlin, J., left open the point whether, if the plaintiff had pleaded that he made the payment under the mistaken belief that the lease was enforceable by the defendant, he could have recovered it. One of Devlin, J.'s difficulties was that fraud had not been pleaded, and to give the plaintiff a remedy would have been tantamount to holding that innocent misrepresentation is a ground for rescission of an executed lease.

(8) The plaintiff's final plea was for money had and received to the use of the plaintiff. This again failed in essence because there was no allegation of fraud. To give relief on this ground would have been to overturn the principles upon which relief is given for innocent misrepresentation.

One is left with an uneasy feeling that the failure of the plaintiff to recover his £111 amounts to a denial of justice. A claim in itself meritorious was defeated on a series of technical grounds. Devlin, J.'s judgment

must be read in the light of the manner in which the action was pleaded. He was throughout anxious to avoid giving a remedy inappropriate to fraud in a case where no allegation of fraud was made. It seems unsatisfactory, however, that the law is unable to assist the plaintiff in a case such as this to recover what he has paid.

(Woodfall, 24th ed., p. 499.)

Dilapidations—expiration of lease during period of requisition—principle upon which damage to the reversion should be computed—Landlord and Tenant (Requisitioned Land) Act, 1944.—*Smiley* v. *Townshend,* [1949] W. N. 441, is a decision of considerable interest to surveyors as well as to lawyers. The point at issue was the correct method of dealing with dilapidations in a case where a lease had terminated while the premises were still under requisition. Section 1 (1) of the Landlord and Tenant (Requisitioned Land) Act, 1944, provides that where leasehold premises are requisitioned no remedy for the breach of any repairing covenant contained in the lease is enforceable, whether by action or otherwise, in respect of damage occurring during the period of requisition. In *Smiley's Case* a long lease had terminated while the premises remained under requisition by a local authority. The respective surveyors of the lessor and lessee agreed upon a method of arriving at the dilapidations for which the lessee was responsible, having regard to section 1 of the 1944 Act, which Lynskey, J., held to be incorrect. The surveyors' method was to take the schedule of condition which was made out at the commencement of the requisition, and assume (a) that any damage occurring after that date was not recoverable under the lessee's repairing covenant, and (b) that the premises had not had any repairs done during the period of requisition towards making good those dilapidations which were already in existence when the requisition began.

Lynskey, J., held that the matter should have been dealt with as follows:—

(1) In determining the dilapidations for which the lessee was responsible, it was quite right to use the schedule of condition at the beginning of the requisition to ascertain what dilapidations existed at that date. The surveyors should, however, also have taken into account the condition at the end of the lease, in order to find out how far the dilapidations which had existed at the commencement of the requisition were still in existence or had ceased to exist as a result of repairs carried out during the period of requisition. Any dilapidations not included in the schedule of condition which were found to exist at the expiration of the lease presumably had occurred during the period of requisition, and for these the local authority, not the lessee, would be responsible.

(2) In ascertaining what injury had been caused to the reversion by the dilapidations for which the lessee was responsible upon the above principle, the proper test to apply was to ask, by what amount was the lessor's reversion, subject to the continuing requisition, reduced by reason of the lack of repair for which the lessee was responsible? This amount would be the difference between (a) the price which the premises would have fetched on a sale, subject to the requisition, at the termination of the lease upon the assumption that the lessee's obligations to repair had been performed, and (b) the price they would fetch on a sale in the same circumstances in the state of disrepair for which the lessee was responsible.

(Woodfall, 24th ed., Supplement No. 5, pp. 48–49.)

5. *FAMILY LAW CASES*

By R. H. Graveson, Ph.D., S.J.D., LL.M., of Gray's Inn, Barrister-at-Law

Enforcement in England of foreign maintenance order—jurisdiction to make an order affecting custody of a child—Harris v. *Harris,* [1949] 2 All E. R. 318.—The enforcement in one country of maintenance orders made by the courts of another country represents, as Professor Gutteridge has shown (*a*), a major social problem of international magnitude of which the solution lies far ahead. One of the few bright patches in this dark sky is found in the existence of reciprocal arrangements between England and certain countries for the mutual enforcement of the orders of each other's courts, an instance of which is provided by *Harris* v. *Harris.* In that case a New South Wales court had made an order in favour of a wife and child there resident, whose husband and father had deserted them and was living in England. The order, which gave custody of the child to the wife, was for sums in excess of the limits which the English magistrates could award.

The husband appealed from the decision of the Middlesex justices confirming the New South Wales award, and the Divisional Court (Lord Merriman, P., and Barnard, J.), after an examination of the relevant legislation of both countries and a consideration of one of the few English cases, *Re Wheat* (1932), 101 L. J. K. B. 720, held that the husband could raise any defence before the Middlesex justices that he could have raised on the original hearing abroad, and that the fact that the justices were confirming an order which, as to amount, they themselves lacked jurisdiction to make, was immaterial. Perhaps the point of greatest interest in the case is the almost implicit acceptance of residence as a basis of jurisdiction for the purpose of making an order for custody of the child, since so far as the child's welfare was concerned, in the words of Lord Merriman, P. (at p. 322): " . . . the Children's Court in Sydney is far better qualified either than the Uxbridge justices or ourselves to deal with the matter ". Domicil as a basis for ordering custody was not considered. Nor was the basis of residence intended to be exclusive, for the Court held that the English Court could review the question of custody to the same extent as any other question arising on the enforcement of the order. The contrast with American law on this point is very marked.

(Dicey, 375, 431.)

Condonation—nature of conduct which will revive condoned matrimonial offence—Richardson v. *Richardson,* [1949] 2 All E. R. 330.—This decision of the Court of Appeal (Bucknill, Asquith and Denning, L.JJ.), will do much to clarify the uncertain law on the question of what kind of conduct, or rather misconduct, which does not in itself constitute a matrimonial offence, will have the effect of reviving a matrimonial offence, in this case adultery, which has been condoned. To decide whether misconduct would have such effect Bucknill, L.J., applied the test " that the conduct at any rate must be such as, if persisted in, will make married life together impossible " (at p. 332). Denning, L.J., approaching the problem from the point of view of the forgiving party, leaned towards a solution which would allow less severe conduct to revive a previously condoned offence. He

(*a*) *The International Enforcement of Maintenance Orders,* 2 International Law Quarterly 155.

framed his test of the effect of such misconduct in these words, " . . . harshness, or neglect of a real and substantial kind which is such as to be likely to inflict misery on the innocent party and does indeed lead to a breakdown of the marriage, is sufficient to revive the original offence " (at p. 333).

(Latey, 126–8.)

Divorce—cruelty—whether insanity is a defence to a charge of cruelty—White v. *White,* [1949] 2 All E. R. 339.—This was a husband's appeal from dismissal of his petition for divorce on the ground of his wife's cruelty. The fact of cruelty was established, but the offending wife was at all material times mentally deranged. Through the Official Solicitor, her guardian *ad litem,* she pleaded ignorance of the nature and quality of her acts, a plea which inevitably led to a consideration of the application of the *M'Naghten* rules ((1843), 10 Cl. & Fin. 200) to insanity as a defence in divorce. Bucknill and Asquith, L.JJ., regarded those rules as applicable to this case, following *Hanbury* v. *Hanbury* (1892), 8 T. L. R. 559. Thus, Bucknill, L.J., remarked (at p. 346): " If the wife deliberately behaved towards her husband in a way which was not in itself quite irrational in circumstances which indicated that she knew what she was doing and that her conduct was wrong, and if that treatment had the natural result of injuring his health, then all the elements seem to me to be present to show that she treated him with cruelty ". In the words of Asquith, L.J. (at p. 348): " . . . if the actor knows 'the nature and quality of his acts' . . . the fact that he is suffering from a disease of the mind is immaterial, even if he would not have committed the acts complained of but for such disease ". But Denning, L.J., voicing the general dissatisfaction with the *M'Naghten* rules, and on principle regarding the effect of insanity as different in criminal and civil cases, considered the question not as one of culpability but of objective liability for the satisfaction of damage caused. As distinct from cases of desertion (*Williams* v. *Williams* (1939), 108 L. J. P. 140), no specific intent is required in cases of adultery and cruelty. On the authority of *Kirkman* v. *Kirkman* (1807), 1 Hag. Con. 409, the learned Lord Justice held, " that a violent and disorderly affection of the mind, *i.e.,* insanity, is of itself no answer to a petition for divorce on the ground of cruelty " (at p. 352). On the analogy of liability in contract and tort, however, the strictness of this rule would be mitigated " if the husband knew that the conduct was due to mental disease " (at p. 352), which, on the facts, he did not know. Although the three judgments of the Court of Appeal were unanimous in allowing the husband's appeal, their reasons were thus significantly different on a point which goes beyond legal considerations to the whole basis of the relation of marriage. In its effect the *M'Naghten* test would protect the insane party, while that of Lord Justice Denning would strongly favour the injured party. In the preservation of existing marriages the Courts appear to favour the former test.

(Latey, 76.)

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6. *INCOME TAX CASES*

By L. J. Stein, Barrister-at-Law

Income tax—capital sum paid to settlor by body corporate connected with the settlement—Finance Act, 1938, *s.* 40.—In *C. I. R.* v. *Potts' Executors* the judgment of Singleton, J. (as he then was) in favour of the

taxpayer (see *ante*, p. 152) has been reversed by the Court of Appeal, [1949] 2 All E. R. 555. Section 40 of the Finance Act, 1938, provides that, to the extent therein specified, " any capital sum paid directly or indirectly . . . by the trustees of a settlement . . . to the settlor " shall be treated as his income. By sub-section (3), " any capital sum paid to the settlor . . . by any body corporate connected with the settlement . . . shall be treated as having been paid by the trustees . . .". By sub-section (5), " capital sum " is defined as meaning " (i) any sum paid by way of loan or repayment of a loan, and (ii) any other sum paid otherwise than as income which is not paid for full consideration in money or money's worth ". In *Potts' Executors*, a company of which the settlor was governing director had, in accordance with a long-standing practice, acted, in effect, as his banker, the company making various payments on his behalf and crediting him, on the other side of the account, with director's fees and expenses due to him. The effect of the payments by the company was that during the material period the account showed, for the time being, a debit balance, though this was subsequently discharged by a cheque drawn by him in favour of the company. It was not disputed that the company was " a body corporate connected with the settlement ", and it was held in the Court of Appeal that, on the true construction of section 40 above, the payments made by the company on P.'s behalf were caught by that section. The effect of the decision is, first, that the words " directly or indirectly " are to be read into the reference, in sub-section (3), to sums paid to the settlor by a body corporate connected with the settlement, and, secondly, that sums paid to a third party on the settlor's behalf, on an implied promise of repayment by the settlor, come within the definition of sums paid directly or indirectly by way of loan to the settlor so as to fall within the first limb of sub-section (5) (*a*). It was not strictly necessary to consider the application of the second limb, but the Master of the Rolls expressed the view that a promise to repay in full, even though without interest, constitutes full consideration in money or money's worth within the meaning of the sub-section.

Surtax—company surtax—apportionment to married woman living with her husband—whether husband liable—Finance Act, 1922, *s.* 21—*Finance Act*, 1936, *s.* 19; *All Schedules Rules*, *r.* 16.—The effect of the decision of the Court of Appeal in *Latilla* v. *C. I. R.*, [1949] 2 All E. R. 589, can be stated very shortly. Where, under the company surtax legislation, income of a privately controlled company is apportioned to a member who is a married woman living with her husband, rule 16 of the All Schedules Rules does not operate to require or enable the surtax assessment arising from the apportionment to be made upon the husband, nor is the surtax recoverable from the husband where, the company having failed to pay, it becomes recoverable from the apportionee by virtue of section 19 (5) of the Finance Act, 1936. The provisions of rule 16 are collecting and not charging provisions. The charge of company surtax under section 21 of the Finance Act, 1922, is primarily a charge on the company. The position was altered by section 19 of the 1936 Act, but only to the extent of enabling the debt due from the company to be recovered from the member, if the company failed to discharge its liability. The word used in section 19 is " member ", and there is no warrant for reading into that section a proviso to the effect that, where the member is a married woman living with her husband, the tax shall be recoverable from the husband. It was by this line of reasoning that the Court of Appeal, reversing the judgment of Atkinson, J., came unanimously to the conclusion that rule 16 has no application in relation to the recovery of company surtax.

The judgment of Croom-Johnson, J., in *The Oxford Group* v. *C. I. R.* (see *ante*, p. 398) has been affirmed by the Court of Appeal, [1949] 2 All E. R. 537.

Income tax—charity—whether trust for charitable purposes only—Income Tax Act, 1918, *s.* 37.—*Ellis* v. *C. I. R.*, 93 S. J. 133, provides one more illustration of the pitfalls to be avoided in the drafting of instruments which may be decisive in determining whether a trust is established for charitable purposes only, so as to enable exemption from tax to be claimed under section 37 of the Income Tax Act, 1918. In *Ellis's Case*, a plot of land had been conveyed to trustees to be held on trusts for the benefit of the Roman Catholic Church. The primary purpose was unquestionably a charitable purpose under the head of the advancement of religion, but, unfortunately for the claim to exemption, the trust deed went on to specify various other purposes, which, though in each case related to the work of the church, gave rise to difficulty. The question arose mainly on the words, " generally in such manner for the promotion and aiding of the work of the Roman Catholic Church in the district in which the property is situate as the trustees with the consent of the Bishop may prescribe ". In delivering the judgment of the Court of Appeal, Jenkins, L.J., pointed out that this, being a sweeping clause following upon a mention of particular objects, must be construed as enlarging the scope of what had gone before. It must, therefore, embrace a wider range of objects than those previously mentioned, and, since these included both provision for worship and for educational work, it was impossible to say that the purposes comprised in the sweeping clause would necessarily be, in the legal sense, charitable purposes only. Moreover, the word " aiding " of itself suggested " a field of work wider than the work to be aided ", to which must be added the further consideration that no activity could be said to be outside the scope of the trust if, in the *bona fide* opinion of the trustees, endorsed by the bishop, it would aid or promote the work of the church in the district in question. There were further provisions of the trust deed which had the effect of empowering the trustees to let the property and apply the rents and profits for such purpose as the trustees, with the consent of the bishop, might prescribe " in connection with " the trust for promoting and aiding the work of the church in the district. The words " in connection with " must, it was held, have the enlarging effect attributed to them in *Re Davies* (1932), 49 T. L. R. 5, and, accordingly, went to fortify the view that the purposes could not be said to be charitable purposes only. On these grounds the Court of Appeal, affirming the judgment of Croom-Johnson, J., held that the claim to exemption must fail.

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7. *ESTATE DUTY CASES*

Estate duty—cesser of trust for accumulation on death of settlor—income undisposed of—Accumulations Act, 1800, *s.* 1—*Finance Act*, 1894, *s.* 1.—The decision of the Court of Session (Outer House) in *Lord Advocate* v. *Smith's Trustees* (see *ante*, p. 304), has been affirmed by the Inner House, [1949] T. R. 305.

THE LIBRARY

Goodeve's Modern Law of Personal Property. Ninth Edition. By R. H. Kersley, M.A., LL.M. London: Sweet & Maxwell, Ltd. 1949. 699 and lxv pp. (£2 5s.)

A new edition of this book has long been overdue and the present edition should be generally welcomed. The wide field covered by *Goodeve's Personal Property* imposes considerable burdens on any editor. Legislation has been active in many fields included in the book and there have been important decisions. The chapters on Company Law, Statutes of Limitation and Trade Marks have been most substantially altered. All recent cases have been included and the value of *Goodeve* as a work of reference has been enhanced by the substitution of sub-headings for sidenotes.

Such minor criticisms as occur to the reviewer are perhaps inevitable if the book is not to assume unmanageable proportions. The note (*e*) on p. 379 is not very clear. On p. 389, notes (*b*), (*h*), it is not stated that the period of limitation is the same in an action for conversion of infringing copies as in an action for damages for infringement of copyright. Two recent cases might have been expounded more fully but the fault lies rather in the ambiguous nature of the judgments (*Ballett* v. *Mingay,* [1943] 1 All E. R. 143, cited on p. 48 but not p. 47; the *High Trees Case,* [1947] 1 K. B. 130, cited p. 219, note (*nn*)).

The proposed changes in Patent Law will now be found in the Patents and Designs Act, 1949 (ch. 62).

A. K. R. Kiralfy.

Russell on Arbitration. By Ernest Wetton, of the Middle Temple, Barrister-at-Law. Fourteenth edition. London: Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. 1949. li and 537 pp. (£3 10s.)

This is the centenary edition of *Russell,* and the previous edition (edited by Mr. E. Cave and the present learned editor) was issued in 1935. It is the longest gap between editions since the book first appeared. The learned editor has introduced the decisions and the changes occurring since 1935 with as little interference as possible with the general arrangement of the book. Nevertheless, the number of decisions and of new statutes affecting arbitration is sufficient to make this book a desirable acquisition for those concerned with this topic.

Current Legal Problems, 1949. Edited by George W. Keeton and Georg Schwarzenberger. Vol. 2. London: Stevens & Sons, Ltd. 1949. ix and 288 pp. (£1 1s.)

This extremely interesting collection of lectures delivered at University College, London, contains one of particular interest to the conveyancer, namely, "The Charity Muddle", by Professor G. W. Keeton. The learned lecturer analyses the difficulty of seeking any satisfactory guide in the recent authorities for the definition of a charity. He seems to be unable to provide any such definitions and, indeed, does not believe that "there is any comfort to be gained from definitions in this branch of law". Respectfully, we would suggest that he does not draw sufficient attention to the importance attached in some recent judgments to the Statute of Elizabeth. This may help to provide some sort of practical touchstone, though in our view not a very logical or desirable one. Nevertheless, this lecture will repay study, and his analysis of the Statute of Elizabeth is particularly illuminating.

For all those interested in the wider aspects of the law the whole volume is

attractive, ranging as it does from lectures on the Final Court of Appeal by the late Lord du Parcq, and English Procedure and Practice by Lord Porter, to Some English Civilians by Professor Jolowicz, and Membership in the United Nations by L. C. Green. At the same time it seems odd, to us, that among the Current Legal Problems there is little to be found apparently in ordinary private law, and yet the flood of litigation does not seem to die away!

Rent Restrictions Guide. By Lionel A. Blundell, LL.M., Barrister-at-Law. Third edition. London: Sweet & Maxwell, Ltd., and The Estates Gazette, Ltd. 1949. xxxii and 237 pp. (17s. 6d.)

Practitioners will warmly welcome a new edition of this admirably clear and accurate *Guide to the Rent Restrictions Acts.* The third edition incorporates the surprisingly large amount of case law which has accumulated since the publication of the second edition in 1946, and also includes the Landlord and Tenant (Rent Control) Act, 1949, and the Regulations made under it. The high standard of lucidity and simplicity for which the Guide is noteworthy has been maintained. The author has reduced the 1949 Act to its proper perspective; the only criticism which might be made is that its provisions, although correctly stated, are perhaps hardly sufficiently explained. Restriction of space and the absence (as yet) of judicial interpretation may, however, fairly be given as reasons for a treatment which is at times slightly laconic.

A minor misprint occurs on page 71. The references under head (c) should be to s. 1 (1) and s. 1 (3).

The Guide continues to justify its claim to meet the needs, not only of legal practitioners but also of property owners, tenants and estate agents. To present so complex a mass of law in so intelligible a form is a feat of exposition which deserves no little credit.

J. Muir Watt.

Rent Tribunals. By Harry Samuels, M.A., and Robert Chope, Barristers-at-Law. London: Stevens & Sons, Ltd. viii and 92 pp. 1949. (4s.)

This useful little book contains a summary of the procedural and substantive law with which Rent Tribunals are concerned. It embodies the new provisions introduced by the Landlord and Tenant (Rent Control) Act, 1949. Its description of the provisions of that Act is inevitably somewhat compressed and hardly conveys to the reader a full impression of the difficulties of interpretation to which the Act gives rise. This, however, is due chiefly to exigencies of space. The authors have obviously made a careful study of the Act.

It is interesting to see that the interpretation of section 11 of the 1949 Act has already been the subject of a difference of opinion among the members of the Rent Tribunal for Islington, Stoke Newington and Hackney, as reported on p. 113 of the *Estates Gazette* for August 6, 1949. There is much to be said for the minority opinion of Mr. Harry Samuels, the Chairman of the Tribunal, who is one of the co-authors of this book. The view taken by Mr. Samuels was the one expressed on p. 73 of the book. This case shows the need for a right of appeal from Tribunals' decisions, which can only be corrected to a limited extent on *certiorari.*

It is to be hoped that many copies of this book may fall into the hands of members of Rent Tribunals. It might well assist them to avoid the necessity of *certiorari* proceedings by clarifying their ideas about jurisdiction.

J. M. W.

The Modern Law of Water Supply. By E. J. O. Gardiner, LL.B. London: Solicitors' Law Stationery Society, Ltd. 1949. lxiv and 591 pp. (£5.)

The aim of this book is to provide, for the guidance of legal practitioners and those interested in the public supply of water, a collection of the legislation on this subject, together with relevant cases.

It accordingly includes the Water Act, 1945, various regulations of general application which have been made under that Act, Part IV of the Public Health Act, 1936, which relates to water supply, and the Water Act, 1948.

The Water Act, 1945, is set out in full and there are extensive annotations at the ends of the various sections, including references to cases which have a bearing upon them. The notes draw attention to many of the amendments to the previous law which are made by the Act.

An Introductory Note outlines the steps taken by the Central Advisory Water Committee (the Milne Committee), which commenced its work in 1937, to revise the Waterworks Clauses Consolidation Act, 1847, and the Waterworks Clauses Act, 1863, including the various reports of that Committee, which resulted in the Water Act of 1945 and the River Boards Act of 1948.

Special reference is made to the new position of the Minister of Health. Under the Act he has imposed upon him the express duty of promoting the conservation of water resources and the provision of adequate water supplies throughout England and Wales. For this he is empowered to exercise numerous additional functions and his powers of supervision are enlarged by the extension to all statutory water undertakers of his default powers, which were previously exercisable only in respect of local authorities, and by the powers conferred upon him to take compulsory action with regard to statutory water undertakings where he considers it expedient and the undertakers are unwilling.

The Introductory Note also calls attention (a) to the simplified procedure provided by the Act, whereby undertakers may be invested with additional powers for the construction of works, etc., and the acquisition of land and water rights, etc., without the necessity of promoting a private Bill or obtaining a Provisional Order; (b) to the power conferred upon the Minister by Order to define areas within which the abstraction of underground water is controlled; and (c) to the fact that statutory water undertakers generally are made subject to the requirement that, subject to their ability to meet existing obligations to supply water for any purposes and to their probable future requirements for domestic purposes not being thereby endangered, they shall give a supply of water on reasonable terms and conditions for non-domestic purposes to the owner or occupier of any premises within their limits of supply.

On March 24, 1948, the Water Act, 1948, received the Royal Assent. This Act was passed to remove difficulties which had arisen from the wording of certain provisions of the Water Act, 1945, and to remedy anomalies which had appeared in the practical application of the latter Act. The Act also included a valuable new provision enabling statutory water undertakers, subject to appropriate safeguards, to enter upon and survey land which they propose to acquire for the purposes of their undertakings.

The preface to the book states that when the Bill for this Act was introduced into the House of Lords, the type of the book had already been set and paged, and consequently those responsible for its production were faced with a problem as to the manner in which the amendments and additions could be brought into the volume. The expedient adopted has been to insert the Act of 1948 between the Public Health Act, 1936, and the Appendix, and to add, in an additional section to the Appendix, a noter-up of the first 497 pages of the book in the light of the changes in the law brought about by the Act of 1948 and the Local Government Act, 1948. In addition, a hard black vertical line has been inserted in the margin opposite to the sections, or parts of sections, or notes, or parts of notes, affected by the new legislation, with a reference in heavy type to the page where the amended section or the amended note will be found.

In the Appendix, in addition to various regulations which have been made under the Water Act, 1945, there are set out in full the Reservoirs (Safety Provisions) Act, 1930, and relevant sections of the Statutory Orders (Special Procedure) Act, 1945, and the Local Government Act, 1948. There is a good index.

The book serves a useful purpose in collecting together the major statutes and regulations affecting water supply and may be commended to legal practitioners and others requiring guidance on this important subject.

S. Reginald Hobday.

A Supplement to Town and Country Planning Law. By James Kekwick. London: Stevens & Sons, Ltd. viii and 325 pp. (25s., *or,* with Main Work, 60s.)

This, as its title suggests, is a supplement to the writer's annotated copy of the 1947 Act, reviewed in this Journal in December, 1947 (Volume 12, p. 160). The scheme of the present book is to commence with a brief commentary on the regulations that have been made under the 1947 Act, followed by a reasonably full "Noter-up" to the main work, page by page, then a print of most of the regulations, somewhat sparsely annotated, and finally a print of the Building Restrictions (War-Time Contraventions) Act, 1946, and the Restriction of Ribbon Development Act, 1935, as amended by the 1947 Act. Interposed also in the Appendices will be found a print of the Central Land Board's circulars, and three of those of the Ministry of Town and Country Planning (but by no means all the important circulars issued by the Ministry).

Unfortunately we are bound to observe that this volume seems to have most of the defects of the Main Work—the notation is explanatory only, and there is no discussion or guidance for the practitioner of the many difficult points in the administration of this Act; such as, to name but a few that have been discussed during the past year in our contemporary, the *Journal of Planning Law,* the "hole in section 23", the question whether the Act concerns matters of title, and the registrability in the local land charges register of conditions imposed in planning permissions. Whereas some regulations have, very rightly if we may say so, been included which are not normally found in this context (*e.g.,* the Acquisition of Land (Assessment of Compensation) Rules, 1919), we have noted at least one important omission, namely, the Local Land Charges (Amendment No. 2) Rules, 1948. The Amendment to the General Development Order issued early in 1949 (SI 1949, No. 195) has been incorporated with the print of the principal Order, but there is no reference to the important paragraph 2 (providing for a procedure for the making of applications for determinations under section 17 of the Act) in the Noter-up against p. 292 of the Main Work (see p. 56 of the present work).

The regulations and notes dealing with the assessment of compensation, especially under the section 58 and section 59 schemes (when these have been published!) have received the fullest treatment, perhaps at the cost of the other portions of the subject. We have found several errors throughout the book (*e.g.,* "than" for "within" at the foot of p. 2, a reference to the wrong regulations at p. 64 (against p. 402 of the Main Work; the reference should be to S. R. & O., 1947, No. 617), and several regulations made in 1947 are described as "SI's"). It is also unfortunate that there is no list of the regulations included in the work, especially as they are printed in the order in which they are referred to in the Act; an order which makes it particularly difficult to find a particular instrument, otherwise than by consulting the general Index, for the titles of the various regulations are not set out at the top of each page.

We have ventured to criticise these points of layout and detail, as this is essentially a practitioner's book, and those consulting it need a work that is complete, accurate and in which a particular point can be found quickly. In these matters we are afraid the present work hardly comes up to the high standards expected from these publishers.

J. F. G.

PRECEDENTS

Form 1

TOWN AND COUNTRY PLANNING ACT, 1947

Clauses for Use in Sales, Leases and Mortgages (*a*)

Drafted by Harold Potter, LL.D., of Gray's Inn

Recitals

(A) The said property was on the 1st day of July 1948 used [as a single private dwellinghouse [and garage] (*b*) and curtilage] *or* [for the purposes more particularly described in the [First] Schedule hereto] and for such other purposes as such user as aforesaid would authorise under or by virtue of the Town and Country Planning Act 1947

User authorised on the Appointed Day.

(B) Since the 1st day of July 1948 aforesaid the said user of the said property has been altered [*or* modified] to include user for the purposes of —— in accordance with a planning permission dated the —— day of ——

Authorised change of user by planning permission.

(C) Since the 1st day of July 1948 aforesaid the user of the building coloured black on the said plan as [a butcher's shop and dwellinghouse] *or* [eight flats] instead of user as [a single private dwellinghouse] has been authorised in accordance with a planning permission dated the —— day of ——.

Parcels

[*Note.*—Words indicating the authorised use of the premises can be included in the parcels themselves, in which circumstances there is no point in incorporating a declaration of use such as appears hereafter, but the method of incorporating the use into parcels should only be used in the simplest cases or it will not be sufficiently definite. Where there is a separate declaration of use words indicating use such as " dwellinghouse " should be avoided as this may lead to ambiguity.]

ALL THAT piece of land forming a garden within a curtilage situate in the Parish of —— in the County of —— [more particularly delineated on the plan drawn in the margin hereof and edged with green] (*c*) Together with the single private dwellinghouse [and outbuildings coloured brown on the said plan] [and garage coloured yellow on the said plan] (*b*) erected thereon and known as ——.

Parcels containing a declaration of use.

(*a*) Space and the great variety of circumstances do not permit of full precedents being given, so that for the time being relevant clauses have been drafted for insertion in the different types of document. Some complete precedents can be found in *The Journal of Planning Law*.

(*b*) Garage should always be mentioned, because use as a garage always needs planning permission.

(*c*) Wherever there are any complications such as outbuildings it is desirable always to have a plan in order to distinguish the different classes of user.

Declaration of Use

1. The said property is held at the date hereof for use of the building coloured red on the said plan as a [single private dwellinghouse] *or* [a private dwellinghouse comprising [three] flats] [together with the outbuildings coloured brown on the said plan within the same curtilage] together with the right to use the same premises for such other purposes as may now or hereafter be authorised with such use aforesaid under or by virtue of the Town and Country Planning Act 1947 or any Act for the time being amending or replacing the same.

2. The said property is held at the date hereof for use for the purposes more particularly described in the [First] Schedule hereto (*d*) together with the right [subject to the previous written consent of the Lessor *or* Mortgagee] to use the same premises for such other purposes as may now or hereafter be authorised in connection with such purposes aforesaid under or by virtue of the Town and Country Planning Act 1947 or any Act for the time being amending or replacing the same.

Covenant for Title

Covenant in conveyance or mortgage.

1. If the said property or any part thereof is at the date hereof subject to any restriction or other obligation [other than designation for compulsory purchase] (*e*) imposed under or by virtue of the Town and Country Planning Act 1947 whereby the said property or any part thereof cannot lawfully be used and enjoyed for any or all of the purposes hereinbefore contained such restriction or obligation shall be deemed to be an incumbrance (*f*) made occasioned or suffered by the [Vendor *or* Mortgagor *or as the case may be*] within the meaning of the covenant implied by the Law of Property Act 1925 by the [Vendor *or as the case may be*] being expressed to convey as [Beneficial Owner] *or* [Trustee *or as the case may be*].

Covenant in a lease.

2. Any act matter or thing being in contravention of the Town and Country Planning Acts 1932–1947 committed before the commencement of this Lease by reason whereof the Lessee shall or may suffer any damage shall be deemed to be a breach of the Lessor's covenant for quiet enjoyment hereinbefore contained.

Other Covenants

Covenant for indemnity against expenses caused by vendor, etc.

1. The [Vendor] for himself his executors administrators and assigns hereby covenants with the [Purchaser] and his successors in title that he the [Vendor] his executors administrators and assigns will at all times hereafter indemnify the [Purchaser] or his successors in title against all expenses costs claims and demands whatsoever in respect of any act matter or thing done or suffered by or on behalf of the [Vendor] [or any person claiming under him [or through whom he derives title to the said property hereby conveyed]] whereby the

(*d*) It is always desirable to use a Schedule wherever there is much land and this should be accompanied by a plan marking any gates abutting on the highway because no change in the gates abutting the highway can be made without planning permission. Trees should also be marked if possible.

(*e*) This exception should only be inserted when there is a Scheme or Development Plan which at the date of the deed designates the land for compulsory purchase.

(*f*) Such a restriction or obligation may not be technically an incumbrance within the meaning of the covenants for title, but in this form the declaration would incorporate liability even on the part of a mortgagee, trustee or personal representative.

[Purchaser] or his successors in title shall be put to any expense cost claim or demand whatsoever under or by virtue of the Town and Country Planning Act 1947 in respect of the said property hereby conveyed (*g*).

Not to make any material change of user without consent.

2. And also will not at any time during the continuance of this [term *or* security] without the previous consent in writing of the [Lessor *or* Mortgagee] erect make or maintain or suffer to be erected made or maintained on the premises hereby [demised *or* charged] or any part thereof any building erection or improvement or make or suffer to be made any material change or addition whatsoever in or to the use of the land hereby [demised *or* charged] or any building or buildings or erection thereon or any part thereof and also if the [Lessor *or* Mortgagee] shall consent in writing as aforesaid will duly apply to the local planning authority as defined by the Town and Country Planning Act 1947 for any necessary permission to erect make or maintain such building erection improvement material change or addition on behalf of the [Lessor *or* Mortgagee] and all other the persons (if any) for the time being interested in the said premises and will give to the [Lessor *or* Mortgagee] notice of such permission if granted within —— days of the receipt of the same from the said planning authority And also the [Lessee *or* Borrower] will at all times indemnify and keep indemnified the [Lessor *or* Mortgagee] his estate and effects against all proceedings costs expenses claims and demands whatsoever in respect of the said application.

Give particulars of notices or orders made under the Act.

3. And also will within —— days of the receipt of notice of the same by him give full particulars to the [Lessor *or* Mortgagee] of any notice or proposal for a notice or order or proposal for an order given issued or made to the [Lessee *or* Borrower] by a planning authority under or by virtue of the Town and Country Planning Act 1947 and if so required by the [Lessor *or* Mortgagee] produce such notice to the [Lessor *or* Mortgagee] and also will without delay take all reasonable or necessary steps to comply with any such notice or order And also will at the request [and cost] of the [Lessor *or* Mortgagee] make or join with the [Lessor *or* Mortgagee] in making such objection or objections or representation or representations against or in respect of any proposal for such a notice or order as the Lessor shall deem expedient.

Not to contravene the Act.

4. And also will not do or omit or suffer to be done or omitted any act matter or thing in on or respecting the said premises required to be omitted or done by the Town and Country Planning Act 1947 or which shall contravene the provisions of the said Act or any of them And will at all times hereafter indemnify and keep indemnified the [Lessor *or* Mortgagee] against all actions proceedings costs expenses claims and demands in respect of any such act matter or thing contravening the said provisions of the said Act or any of them as aforesaid.

(*g*) This covenant could, it is thought, only be incorporated if provided for in the contract or otherwise agreed between the parties. Its purpose is rather wider than unauthorised development (though this may be important in connection with, *e.g.*, war time user) since it should include, *e.g.*, non-compliance with an abatement notice, or order for control of advertisements.

Miscellaneous Provisions

Declaration against frustration by change of use.

1. Nothing herein shall render the Lessor or Lessee liable in respect of any of the covenants conditions and provisions hereinbefore contained if and so far only as the performance or observance of such covenants conditions and provisions or any one or more of them shall hereafter become a contravention of or otherwise impossible or illegal under or by virtue of the provisions of the Town and Country Planning Act 1947 or any order notice regulation or direction made thereunder but subject as aforesaid the term hereby granted and the rent payable to the Lessor in respect thereof shall not determine by reason only of any changes modifications or restrictions of user of the said premises or obligations or requirements hereafter to be made or imposed under or by virtue of the said Act (*h*).

Declaration to cover apportionment of development and similar charges.

2. The costs expenses claims or demands (including any development charge payable to the Central Land Board (*i*)) incurred or made in respect of any works executed in pursuance of or otherwise arising in connection with compliance with any planning permission or order for discontinuance of user of the demised premises or any part thereof granted or made under or by virtue of the Town and Country Planning Act 1947 shall be borne by the Lessor and the Lessee in such proportions as they shall agree and in default of agreement shall be determined according to the benefit or loss respectively enjoyed or suffered respectively by the Lessor and the Lessee by arbitration in accordance with the Arbitration Acts, 1889–1934.

Declaration of costs, expenses in mortgage.

3. All costs charges and expenses properly incurred hereunder by the Mortgagee expressly including any costs charges or expenses incurred or paid by the Mortgagee by virtue of or in connection with any act matter or thing arising under or by virtue of the Town and Country Planning Act 1947 whether or not occasioned by any act neglect or default of the Borrower shall together with interest thereon at the said rate of £—— per cent. per annum be charged on the property for the time being subject to this security and shall on the same being paid be repaid to the Mortgagee by the Borrower with interest thereon from the time of payment at the rate aforesaid and until such demand shall be made and complied with the Borrower shall in part payment of such interest pay to the Mortgagee interest at the rate aforesaid on the moneys so paid and for the time being not yet repaid on the respective days hereinbefore appointed for payment of interest on the said principal sum of £—— Provided that the charge hereby conferred shall be in addition and without prejudice to any and every other remedy lien or security which the Mortgagee may or but for the said charge would have for the moneys thereby secured or any part thereof.

(*h*) Owing to the rule that leases are not subject to the general rules concerning frustration (*Cricklewood Property, etc., Trust* v. *Leighton's Investment*, [1945] A. C. 221), and the difficulty that impossibility does not relieve a lessee from liability under a covenant (*Mathey* v. *Curling*, [1922] 2 A. C. 180; *Denman* v. *Brise*, [1948] 2 All E. R. 141), some provision is clearly desirable to deal with the possibilities of variation by planning changes.

(*i*) If lessors attempt to pass on the liability to development charge to lessees irrespective of any benefit accruing to them, steps will probably be taken by compulsory acquisition to prevent the practice.

4. In the event of any order for compulsory acquisition of the property hereby charged or any part thereof being made and confirmed under or by virtue of the Town and Country Planning Act 1947 the said principal sum of £—— hereby secured shall be deemed to have been called in and unpaid for three months on the date on which such order was confirmed as aforesaid and all the Mortgagee's powers for the realisation and protection of the security hereby created shall become exercisable on such date as aforesaid.

Declaration that order for compulsory acquisition gives right to exercise power of sale (*k*).

Form 2

Forms of Trust for Payment of Income to a Beneficiary with Power to Make Up Out of Capital the Amount by which the Income Falls Below a Certain Figure, Framed with a View if Possible of Avoiding Income Tax on the Advances (*a*).

I

Trust of Income of Residuary Estate for Widow

1. MY Trustees shall pay the income of the Trust Fund to my wife during her life so long as she shall remain my widow.

2. My Trustees may at any time or times in their absolute and uncontrolled discretion raise and pay out of the capital of the Trust Fund to or for the benefit of my said wife any sum or sums not exceeding in the aggregate one —— part of the amount or value thereof PROVIDED that the aggregate of all the sums so raised and paid during any financial year shall not exceed the difference between the net income actually received from the investments for the time being representing the Trust Fund after deduction of income tax thereon at the standard rate for the time being in force and £x.

(*k*) It must be borne in mind that on compulsory acquisition the authority will pay only "existing use" value, but very often where land is concerned considerably higher prices have been paid and mortgagees may need to take immediate steps.

(*a*) In view of the possible fluctuation in the normal rate of interest on trust investments, where the estate consists of such, or of non-trustee investments producing a high rate of interest which are authorised to be retained, it may often be desirable in modern wills to provide for advances out of capital to secure to the beneficiary a fixed minimum income. If the power is framed expressly as one to make up the beneficiary's income, whether the income is an annuity, or the income of a fund, the advances will be treated as capital in the hands of the recipient and be subject to income tax accordingly: see *Cunard's Trustees* v. *I. R. C.*, [1946] 1 All E. R. 159; *John Morant Settlement Trustees* v. *C. I. R.*, [1948] T. R. 71. In all the reported cases there has, however, been, in addition to the quality of recurrence in the payments, either some indication of an intention that the advances were to be a supplement to the beneficiary's income or means of support or an imperative trust to make up the income. Where there is no such intention expressed and the advances are made under an ordinary power of advancement, it seems that the mere recurrence of the payments would not necessarily cause them to be treated as income; and, to carry the argument a stage further, it seems that to limit the advances in any year to a fixed amount, even by reference to the income of the fund, should not result in attracting income tax.

It must be emphasised that the effectiveness of the above Precedent to avoid income tax on the advances is not free from doubt; but it may be worth while to make the attempt, as there appears no other method of carrying out the transaction which would have a better chance of doing so.

II

Bequest of Income of Legacy (*b*)

1. I BEQUEATH free of duty to my Trustees the sum of £x UPON TRUST to pay the annual income thereof to A during her life and from and after the death of the said A the said sum and the investments representing the same or so much thereof as shall not have been paid to the said A under the provision hereinafter contained shall sink into and form part of my residuary estate.

2. My Trustees shall appropriate investments forming part of my residuary estate (being investments of a nature authorised by this my will to be retained) in satisfaction of the said sum of £x without the necessity of obtaining the consent of the said A and such appropriation shall bind all persons interested in the said sum.

3. As from my death and until such appropriation the said sum of £x shall carry interest at the rate of £y per cent. per annum (*c*).

4. My Trustees may at any time or times in their absolute and uncontrolled discretion raise and pay out of the said sum of £x or the investments for the time being representing the same to or for the benefit of the said A any sum or sums not exceeding in the aggregate one —— part of the amount or value thereof PROVIDED that the aggregate of all sums so raised and paid shall not in any year exceed the difference between the net income actually received from the investments for the time being representing the said sum of £x after deduction of income tax thereon at the standard rate for the time being in force and £z.

Form 3

Settlement on Marriage of Investments belonging to the Wife and Proceeds of Sale of Freeholds Belonging to the Husband. Power of Husband and Wife to Resettle on Re-marriage After Death of Other Spouse or After Divorce.

I

Conveyance on Trust for Sale of Freeholds by Husband

Parties.

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Husband") of the first part B of *etc.* (hereinafter called "the Wife") of the second part and C of *etc.* and D of *etc.* (hereinafter called "the Trustees") of the third part.

Recitals: intended marriage;

WHEREAS :—

1. A marriage is intended shortly to be solemnised between the Husband and the Wife.

(*b*) This Precedent is intended to meet the objection to the ordinary form of bequest of a fixed annuity, that resort to capital, whether under an express or implied power, would involve payment of income tax on the capital used to make up a deficiency. It appears to be safer to give a legacy of an amount calculated by the testator to produce the required income at the prevailing rate of interest rather than such a sum as would at a certain rate of interest produce such amount of income. See as to the effectiveness of this Precedent note (*a*), *supra*.

(*c*) This will be the normal rate at the date of the will and may require subsequent revision by codicil.

2. The Husband is the estate owner in fee simple free from incumbrances of the property intended to be hereby assured. title to freeholds;

3. Upon the treaty for the said intended marriage it was agreed that the said property should be settled in manner hereinafter appearing. agreement to settle.

NOW THIS DEED made in pursuance of the said agreement and in consideration of the said intended marriage WITNESSETH and IT IS HEREBY AGREED AND DECLARED as follows :—

1. The husband As SETTLOR with the approbation of the wife hereby conveys unto the Trustees Conveyance.

ALL THAT *etc.* Parcels.

To HOLD unto the Trustees in fee simple UPON TRUST that they shall with the consent in writing of the Husband and the Wife during their joint lives and of the survivor of them during his or her life and after the death of such survivor at the discretion of the Trustees sell the said property or any part thereof and shall hold the net proceeds of any such sale (after payment of costs) and of the net rents and profits of such part of the same property as shall for the time being remain unsold (after payment of outgoings) UPON TRUST for the Husband absolutely until the solemnisation of the said intended marriage and thereafter Upon the Trusts and with and subject to the powers and provisions declared and contained concerning the same in a settlement (hereinafter called " the Settlement ") already prepared and intended to bear even date with this Conveyance and to be made between the same persons who are parties hereto and in the same order. Habendum.

2. During the life of the Survivor of the Husband and the Wife and the Trustees (meaning the Trustees personally) and of the issue now living of His Late Majesty King George V and twenty-one years after the death of such survivor the Trustees or other the trustees for the time being of this Conveyance may by way of extension of the powers conferred on them by statute raise money by mortgage for any purpose for which they can apply capital money and the provisions of section seventeen of the Trustee Act, 1925, shall apply for the protection of the mortgagee. Additional power to mortgage.

3. The power of appointing a new trustee or new trustees of this Conveyance shall be vested in the Husband and the Wife during their joint lives and in the survivor of them during his or her life. Power to appoint new trustees.

[4. The covenant implied herein by the Husband conveying and being expressed to convey as Settlor shall not render him or any person deriving title under him liable to discharge or get in any incumbrance or estate not created by the Husband or any such person] (*a*). Limitation of liability under covenants for title.

IN WITNESS *etc.*

II

Settlement of the Proceeds of Sale and Investments

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called " the Husband ") of the first part B of *etc.* (hereinafter called " the Wife ") of the second part and C of *etc.* and D of *etc.* (hereinafter called " the Trustees ") of the third part. Parties.

(*a*) This clause may be desirable if the title is not fully gone into before the settlement.

Recitals: intended marriage;

WHEREAS :—

1. A marriage is intended shortly to be solemnised between the Husband and the Wife.

Conveyance of freeholds by husband.

2. By a Conveyance (hereinafter called "the Conveyance") bearing even date with but executed before this Settlement and made between the same persons who are parties to this Settlement and in the same order the Husband has with the approbation of the Wife and pursuant to an agreement in that behalf made upon the treaty for the said intended marriage conveyed certain freehold property situate at —— in the County of —— and therein more particularly described to the Trustees in fee simple UPON TRUST with the consent in writing of the Husband and the Wife during their joint lives and of the survivor of them during his or her life and after the death of such survivor at the discretion of the Trustees to sell the same or any part thereof with power to postpone such sale and to hold the net proceeds of sale (after payment of costs) and of the net rents and profits of such part of the same property as should for the time being remain unsold (after payment of outgoings) Upon the Trusts and with and subject to the powers and provisions declared concerning the same by a settlement therein referred to being this Settlement.

3. The investments mentioned in the Schedule hereto annexed and belonging absolutely to the wife have been transferred into the joint names of the Trustees to be held by them upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same.

4. It was agreed on the Treaty for the said intended marriage that such settlement should be executed as is hereinafter contained.

Trusts of investments and proceeds of sale, to invest;

NOW THIS DEED made in pursuance of the said agreement and in consideration of the said intended marriage witnesseth and IT IS HEREBY AGREED AND DECLARED as follows :—

1.—(1) The Trustees shall stand possessed of the said investments mentioned in the said Schedule hereto IN TRUST for the Wife until the solemnisation of the said intended marriage (*b*)

Successive life interests in husband's fund.

(2) From and after the solemnisation of the said intended marriage the Trustees shall stand possessed of the same investments and of the net moneys to arise from any sale under the recited trust for sale in the Conveyance and any capital moneys arising thereunder UPON TRUST that the Trustees may either allow the said investments or any of them to remain as actually invested or at any time or times with the consent of the Husband and the Wife during their joint lives and of the survivor during his or her life and after the death of the survivor at the discretion of the Trustees may sell the same or any of them and shall

(*b*) It is practically impossible to frame any general provisions applicable in the event of a decree of nullity. Such a decree pronounces the marriage null and void *ab initio*, and accordingly the trusts declared for the settlors until marriage remain in force and those declared after solemnisation never arise: *Re Wombwell's Settlement*, [1922] 2 Ch. 298. The husband and wife are therefore entitled to a re-transfer of their respective funds, subject to any payments actually made. The same applies to a fund brought in by other parties, even if there is an ultimate trust for persons other than the settlor: *Re Ames' Settlement*, [1946] Ch. 217. This would usually accord with the intention, except that possibly where the husband has concealed the grounds on which the decree is founded it might be considered unjust for the wife to be deprived of her reversionary life interest in his fund. It is therefore considered preferable to leave any variation of the settlement to the Court.

with the like consent or at the like discretion invest the net proceeds of sale thereof and also the net moneys to arise from any sale made under the recited trust for sale in the Conveyance and any other capital moneys arising thereunder in the names or under the control of the Trustees in or upon any of the investments hereinafter authorised with power with the like consent or at the like discretion to vary such investments for others of a like nature.

2. The Trustees shall pay the income of the net moneys to arise from any sale made under the recited trust for sale in the Conveyance and any capital moneys arising thereunder and the net rents and profits of the unsold portion for the time being of the said property assured by the Conveyance and the investments for the time being representing such net proceeds of sale and capital moneys (hereinafter called "the Husband's Fund") to the Husband during his life And after his death to the Wife if surviving during his life (*c*).

Successive life interest in wife's fund.

3. The Trustees shall pay the income arising from the said investments mentioned in the said Schedule hereto and the property for the time being representing the same (hereinafter called "the Wife's Fund") to the Wife during her life And after her death to the Husband if surviving during his life.

Trusts for children an issue as husband and wife appoint and in default for children equally.

4. After the death of the survivor of the Husband and the Wife the Trustees shall stand possessed of the capital and future income of the Husband's Fund and the Wife's Fund upon the Trusts following that is to say:—

(1) IN TRUST for the children or remoter issue of the said intended marriage or for some or one of them at such ages or times (so far as the rule against perpetuities will permit) and in such shares (if more than one) and for such interests and upon such trusts for their respective benefit and with such provisions for their maintenance advancement education or benefit at the discretion of any person or persons and generally in such manner as the Husband and the Wife shall from time to time by deed revocable or irrevocable jointly appoint And in default of and subject to any such appointment as the survivor of them the Husband and the Wife shall by deed revocable or irrevocable or by Will or codicil appoint And in default of and subject to any such appointments IN TRUST for all or any the children or child of the said intended marriage who being male attain the age of twenty-one years or being female attain that age or marry under that age [with the consent of their or her parent or parents guardian or guardians]

Hotchpot clause.

(2) No child who or whose issue takes any part of the Husband's Fund or the Wife's Fund under any appointment made under any of the powers hereinbefore contained shall in the absence of a contrary intention expressed in such appointment be entitled to any share in the unappointed part except upon bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly

Powers of maintenanc and advancement.

(3) The statutory powers of maintenance and advancement shall apply to this Settlement.

(*c*) It is not usual to give the wife a protected life interest unless there is any special reason, though the old restraint on anticipation was almost universally employed.

Ultimate trusts.

(4) If there shall be no child of the said intended marriage who shall attain a vested interest under the trusts hereinbefore declared then subject to the trusts hereinbefore declared and to any exercise of the powers incorporated herein by reference or by law conferred on them the Trustees shall stand possessed of the Husband's Fund In Trust for the Husband absolutely and shall stand possessed of the Wife's Fund In Trust for such person or persons or purpose or purposes as the Wife shall while discovert by any deed or deeds revocable or irrevocable or whether covert or discovert shall by will or codicil appoint And in default of and subject to any such appointment In Trust for the Wife absolutely if she shall survive the Husband But if she shall predecease the Husband then In Trust for the person or persons who would have become entitled thereto under the Administration of Estates Act 1925 at her death if she had died possessed thereof intestate [domiciled in England] and without ever having been married [to the Husband] (*d*) Such persons (if more than one) to take as tenants in common in the shares in which they would have taken under the said Act.

Covenant by wife to settle after-acquired property (*e*).

5.—(1) The Wife hereby covenants with the Trustees that if she shall at any time during the said intended marriage become entitled to any real or personal property for any estate or interest whatsoever (other than such as is by this Settlement specifically settled or is hereinafter excepted) she the Wife or her personal representatives and all other necessary parties (if any) will assure or transfer the same to the Trustees to be held by them upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the Wife's Fund or as near thereto as circumstances will permit and as one fund with the Wife's Fund for all purposes including the hotchpot provision and as regards freehold or leasehold property upon trust with such consent or at such discretion as is mentioned in the Conveyance to sell the same

(2) The foregoing covenant shall not apply to the following property, *viz.* :—

(i) Property of a less value than £x to which the Wife shall become entitled at the same time and from the same source

(ii) Gifts by the Husband to the Wife

(iii) Property as to which a contrary intention is declared by the donor or appointor in the instrument (if any) under which it is acquired by the Wife or in a memorandum signed by the donor or appointor at the time of the gift or which would be forfeited if bound by the foregoing Covenant

(iv) Moveable chattels or effects of household domestic or personal use or ornament

(v) Accumulations of income of the Wife whether invested or not or property purchased therewith

(vi) Annuities or other interests for the life of the Wife or for any term determinable on or by notice after her death

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(*d*) The words in brackets will let in issue of the wife by a former husband who would be excluded if they were omitted.

(*e*) This covenant is not a usual provision in a marriage settlement, and should in any case only be inserted where the wife has power to resettle on a future marriage.

(vii) Property to which the Wife becomes entitled under any disentailing assurance

(3) The Trustees shall not be liable or accountable for any property which may become subject to the foregoing covenant unless and until the same shall have been actually assured or paid to them nor for omitting to take any proceedings to get in the same or any part thereof unless and until required so to do by some person or the guardian of some person beneficially interested under this deed and upon such security being given for the costs of such proceedings as they shall think fit.

Power to resettle on a future marriage, exercisable on divorce or death of a spouse.

6.—(1) If the Husband or the Wife shall marry again (whether after the dissolution of the now intended marriage or after the death of the other of them) he or she or both of them may in contemplation of or subsequently to any such future marriage (but subject and without prejudice to any appointment already made under any of the powers hereinbefore contained) by deed revocable or irrevocable or by will or codicil appoint that the income of such portion not exceeding the portion hereinafter specified of the Husband's Fund or the Wife's Fund as the case may be shall in priority to the trusts hereinbefore declared be paid to his or her after-taken wife or husband (*f*) during his or her life or any lesser period and subject or not to any restrictions and also to revoke the trusts powers and provisions hereinbefore contained of such portion not exceeding the portion hereinafter specified of the capital of the Husband's Fund or the Wife's Fund as the case may be and to appoint that such last-mentioned portion shall be held upon such trusts and with and subject to such powers and provisions for the benefit of the issue of such future marriage (so far as the rule against perpetuities shall permit) as the Husband or the Wife respectively shall think fit but so that no child or remoter issue of such future marriage shall (except by way of advancement) take an interest vesting earlier than his attainment of the age of twenty-one years or in the case of females her attainment of that age or earlier marriage

(2) The portion of capital of the Husband's Fund or the Wife's Fund the income of which may be appointed under the present powers to an after-taken spouse shall be one —— part thereof or the portion of the capital of such fund which may be capable of being appointed hereunder for the benefit of the issue of the marriage between the Husband or the Wife and such after-taken spouse whichever shall be the larger and the amount of income for the time being payable under such appointment to such after-taken spouse shall if necessary be calculated in accordance with the number of children of the now-intended and such future marriage as shall for the time being be in existence (whether or not having attained vested interests) and as shall have died after having attained a vested interest

(3) The portion of capital of the Husband's Fund or the Wife's Fund which may be appointed under this present power for the benefit of the issue of a future marriage shall not (if there shall be a child or children of the now-intended and such future marriage) bear a greater proportion to the residue of such fund than the number of children of such future marriage who being male attain the age of

(*f*) This will authorise an appointment under which the future spouse will take even if divorced at the appointor's death: *Re Slaughter*, [1945] Ch. 355.

twenty-one years or being female attain that age or marry under that age bears to the number of children of the now intended marriage who being male attain the age of twenty-one years or being female attain that age or marry under that age with [such consent as aforesaid]

(4) The foregoing powers of appointment may be exercised so often as the Husband or the Wife shall remarry but so that the aggregate portions of income or capital appointed thereunder shall not exceed the portions hereinbefore specified and any appointments shall if necessary have priority and take effect as between themselves according to their respective dates

(5) Subject to any exercise of the foregoing powers of appointment the Husband's Fund and the Wife's Fund shall be held upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained (*g*).

Power to purchase residence.

7.—(1) The Trustees shall upon being directed so to do in manner hereinafter provided raise any sum not exceeding £x and apply the same in the purchase (including the costs of and incidental to the purchase) repair (whether structural or otherwise) making of improvements in decoration and furnishing of a messuage and appurtenances together with suitable gardens and land to be held therewith situate in England or Wales or Northern Ireland and being freehold or leasehold held for any term of years such messuage and premises to be held as a residence for the Husband the Wife and the issue of the said intended marriage or any one or more of such persons but so that none of the persons aforesaid shall acquire any absolute right to the possession or occupation of the said premises but shall reside therein only by the permission of the Trustees and upon such terms as to payment of outgoings and otherwise as the Trustees in their absolute and uncontrolled discretion shall think fit to impose (*h*)

(2) If the amount so applied as aforesaid shall not in the first instance amount to the said sum of £—— the Trustees may at any time or times and if required by a direction in manner hereinafter provided shall purchase any further land or property adjoining or suitable to be held with the premises already purchased or necessary for the preservation of the amenities thereof but so that the aggregate sum applied under this present power shall not at any one time exceed the said sum of £——

(3) A direction to purchase premises under this present power shall be in writing signed by the Husband and Wife jointly during their joint lives or by the survivor of them during his or her life and may specify the particular premises to be purchased and whether the money is to be raised wholly out of the Husband's Fund or the Wife's Fund or in any and if so what proportions out of both but in default of any direction in this respect the Trustees may in their absolute and un-

(*g*) If it is desired that the power of resettlement should be exercisable on divorce as well as on the death of a spouse, it is necessary expressly so to provide, as the Court will not generally vary the settlement so as to give power to a spouse to appoint to children of a future marriage concurrently with those of the dissolved marriage, or accelerate such a power when made exercisable only on the death of the other party to the marriage, even if it extinguishes his or her reversionary life interest.

(*h*) The beneficiaries must not be given a right to possession which could be held to override the trust for sale and create a settlement for the purposes of the Settled Land Act, 1925: see *Re Hanson, Hanson* v. *Eastwood*, [1928] Ch. 96.

controlled discretion determine out of what fund or funds and in what proportions the money shall be raised

(4) The Trustees shall be bound to give effect to any such direction as aforesaid and shall not be chargeable with breach of trust by reason only of the price paid or the value of the premises or the title shown thereto or generally as to the propriety thereof as an investment nor shall the husband or the wife be liable for giving any such direction

(5) The premises so purchased shall be conveyed or assigned to the Trustees UPON TRUST with such consent or at such discretion as is contained in the Conveyance to sell the same or any part thereof with power to postpone such sale and to hold the net proceeds of any such sale (after payment of costs) upon the like Trusts and with and subject to the like powers and provisions (including this present power) upon and subject to which the money so laid out in the purchase of the said premises would have been subject if it had not been so laid out PROVIDED nevertheless that the Trustees if they shall have special reason for so doing may in their absolute and uncontrolled discretion sell the said premises or any part thereof with the consent only of one of them the Husband and the Wife (*i*).

Investment clause.

8.—(1) Money subject to the Trusts hereof may be invested in or upon—

(i) The public stocks funds or government securities of the United Kingdom or any colony [or of any foreign government or state or colony or dependency thereof]

(ii) The bonds debentures debenture or rentcharge stock mortgages obligations or securities or the guaranteed preference or ordinary stock or shares or ordinary preferred or deferred or other stock or shares of any Company public or private wherever incorporated or carrying on business or public municipal or local body or authority in any part of the world [but not including bonds to bearer or other negotiable instruments or any documents of title negotiable by delivery with or without endorsement]

(iii) The units of any investment trust constituted in the United Kingdom or any other part of the world

(iv) The security of any interest for life or vested or contingent interest in real or personal immoveable or moveable property locally situate in any part of the world together with a policy of assurance on the life or against the contingency

(v) The shares or deposits of any permanent building society registered in the United Kingdom

(vi) Freehold leasehold or chattel real securities (including first charges under the Land Registration Act, 1925, but not second or subsequent mortgages equitable mortgages or charges or contributory mortgages) in England or Wales [or first mortgages or securities upon real or immoveable (whether with or without moveable) property situate in any other part of the world] together in the case of leaseholds having less than sixty years to run at the date of such investment with

(*i*) The power should authorise the creation of an express trust for sale: see *Re Hanson, supra.* The power to sell with the consent of one of the spouses is to provide against the possibility of the spouses quarrelling and one of them refusing consent to a sale of premises purchased out of the other's trust fund.

a sinking fund policy for securing a sum not less than 20 per cent. larger than the sum lent

(vii) The purchase of freehold or of leasehold property held for any term situate in England or Wales such property to be assured to the Trustees upon trust with such consent or at such discretion as is mentioned in the Conveyance to sell the same

(2) For the purpose of this clause the expression "United Kingdom" shall mean the United Kingdom of Great Britain and Ireland and "Colony" shall mean any dominion commonwealth union dependency or colony forming part of the British Empire or any province or state having a local Legislature and forming part thereof respectively but not Eire.

Additional powers over land.

9. The Trustees in addition to the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925 (including the power to effect the transactions mentioned in section 73 of the same Act and the powers conferred by section 102 thereof) may during the life of the survivor of the Trustees (meaning the Trustees personally) the Husband the Wife and the issue now living of His Late Majesty King George V and twenty-one years after the death of such survivor (1) apply trust money (a) in making improvements upon any land (including premises purchased under the power to purchase a residence hereinbefore contained) or in erecting repairing making structural alterations in or pulling down and rebuilding buildings or other erections upon the same (b) in providing fixed equipment required to be provided in regard to agricultural land and generally in complying with the requirements of any order or direction under the Agriculture Act, 1947, or any statutory re-enactment or amendment thereof and the requirements of the Town and Country Planning Act, 1947, and any other statute statutory instrument or regulation (c) in payment of the costs (including surveyors' fees) of and incidental to any application or intended application under the Town and Country Planning Act, 1947, for permission for development (2) raise money by mortgage for any purpose for which they can apply capital money and the provisions of section seventeen of the Trustee Act, 1925, shall apply for the protection of the mortgagee.

Powers over land abroad.

[9A. The Trustees shall hold any real or immovable property (including leaseholds situate outside England or Wales which may become vested in them free from any right of redemption) UPON TRUST to sell the same with power at their discretion to postpone sale and shall have in relation thereto all the powers hereinbefore made applicable to land purchased by them including the statutory powers of trustees of appointing agents and attorneys.]

Power to effect sinking fund policies.

10.—(i) If any premises purchased by the Trustees under any of the powers herein contained shall be of leasehold tenure having less than [sixty] years to run the Trustees may if they think fit effect or purchase a sinking fund policy or policies for securing a sum or sums equal to the purchase price of the premises and the costs of and incidental to the purchase and any anticipated liability for repairs

(ii) The Trustees shall pay the premiums required for effecting and maintaining any such sinking fund policy or policies out of the income of the fund or proportionately out of the income of the funds out of which the premises were purchased and shall pay the purchase

money of any such policy purchased by them in like manner out of the capital of the same fund or funds and shall retain the same policies until the money secured shall become payable or the premises shall be sold

(iii) The moneys secured by and received in respect of any such policy as aforesaid or the proceeds of such sale thereof if the premises in respect of which the same is taken out or purchased shall be sold Upon the like Trusts and with and subject to the like powers and provisions (including this present power) as the money laid out in the purchase of the premises and policy so purchased would have been held if the same had not been so laid out.

Provisions as to deposit of bearer securities.

11.—(1) The Trustees shall deposit with a Bank selected by them any bonds to bearer or other negotiable instruments or any documents of title negotiable by delivery with or without indorsement for the time being subject to the trusts hereof and shall insure and keep insured the same against loss or damage by fire theft or defacement PROVIDED that the deposit of any such bonds instruments or documents of title in accordance with the requirements of the Exchange Control Act, 1947, or any rules or orders made thereunder or any other statute statutory instrument order or regulation for the time being in force shall be a sufficient compliance with the requirement of this Clause as regards such deposit.

(2) Any premiums or other moneys requisite for effecting or keeping up any such insurance as aforesaid shall be paid out of the income of the Fund or proportionately out of the income of the funds which the insured documents represent.

Power to make arrangements on reconstruction of companies, and provisions as to mortgages.

12. The Trustees shall have power (i) to make such arrangements upon the reconstruction of any company in which they hold stocks shares or securities as if they were the absolute owners of such stocks shares or securities (ii) to release part of any property subject to a security held on the trusts hereof if satisfied that the remaining security is sufficient to cover all money remaining due thereon and to vary the terms of any such security (iii) to contract that any sum invested by them on mortgage shall not be called in for any period they shall think fit.

Power to determine questions and appropriate.

13. The Trustees may (i) determine what moneys are to be considered as capital and what income (ii) determine what expenses costs and outgoings are properly payable out of capital or income (iii) exercise the powers of appropriation conferred by section 41 of the Administration of Estates Act, 1925, without any of the consents requisite for the execution of such powers by personal representatives (iv) determine all matters of doubt and questions arising in the execution of the trusts and powers hereof and every such determination (whether expressly or impliedly made) shall be conclusive and binding upon all persons then or thereafter to become interested under the trusts or powers hereof.

Trustees' indemnity.

14. The Trustees shall not be liable for any loss occasioned to the Trust property by any investment made by them in good faith and in the belief that the same was a proper investment.

Power for professional trustee to charge.

15. Any Trustee for the time being of this Settlement who is a solicitor or is engaged in any other profession or business may charge and be paid all usual professional or other proper charges for business

done and time expended by him or his firm in relation to the trusts hereof including reasonable charges in addition to disbursements in respect of matters which could have been attended to personally by a Trustee who was not in any profession or business.

Power to appoint new trustees.

16. The power of appointing a new trustee or new trustees of this Settlement shall be vested in the Husband and the Wife during their joint lives and in the survivor of them during his or her life.

IN WITNESS, *etc.*

The Schedule above referred to.

[This will contain particulars of the investments settled by the Wife.]

Form 4

Will of Married Woman giving One Moiety of her Property to her Husband and Remaining Moiety to Children at 25 or marriage. Provisions for Payment of Whole Income of Children's Moiety to Husband for Their Maintenance until the Youngest Attains 21 (*a*).

This is the last will of me A wife of B *etc.* which I make this —— day of —— 19— hereby revoking all other wills and testamentary dispositions by me heretofore made.

Appointment of executors.

1. I appoint my said husband and my brother C (hereinafter called "my Trustees") executors and trustees of this my will.

Legacies.

2. I give the following legacies free of duty *viz.* :—

Bequest of chattels.

3. I give to my husband my personal chattels as defined by section 55 (x) of the Administration of Estates Act 1925.

Devise and bequest of residue on trust for sale.

4. (1) I devise and bequeath all the real and personal property whatsoever and wheresoever of or to which I shall at my death be seised possessed or entitled or over which I shall then have a general power of appointment or disposition by will (except property otherwise disposed of by this my will or any codicil hereto) unto my Trustees upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same

(2) My Trustees shall sell call in collect and convert into money the said real and personal property at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my Trustees that an earlier sale would be beneficial) with power in their uncontrolled discretion to postpone the sale calling in or conversion of the whole or any part or parts of the said property during such period as they shall

(*a*) This precedent is intended to meet the case where the whole income of the children's share is likely to be required for the common maintenance of all those children who are for the time being infants or unable to support themselves. In the case of larger estates the same scheme would be useful, but it would be preferable to carry it out by giving the trustees a power to use the income of any child's share for the common maintenance of all the children and not to insert an imperative trust for maintenance. The precedent should not be used without due consideration, especially where there is a great difference in the children's ages, or there are likely to be more children.

think proper and to retain the same or any part thereof in its actual form of investment without being responsible for loss

(3) The rents profits and income of such of my said real and personal property as for the time being shall remain unsold shall as well during the first year after my death as afterwards be applied as if the same were income arising from investments hereinafter directed to be made of the proceeds of sale thereof and that no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my will.

Trust for payment of debts, etc.

5. My Trustees shall out of the moneys to arise from the sale of my said real estate and the calling in and conversion of such of my said personal property as shall not consist of money and out of my ready money pay my funeral and testamentary expenses (including all estate duty leviable at my death in respect of my residuary estate) and debts and the legacies bequeathed by this my will or any codicil hereto and all death duties and other moneys which under or by virtue of any direction or bequest free of duty contained in this my will or any codicil hereto are payable out of my general personal estate and make provision for the payment of any annuities hereby or by any codicil hereto bequeathed by me and in relation to such payments and provisions the rule of equity called the rule in *Allhusen* v. *Whittell* shall be disregarded.

Trust for investment o proceeds.

6. My Trustees shall at their discretion invest the residue of the said moneys in or upon any of the investments hereby authorised with power to vary or transpose such investments for others of a nature hereby authorised.

Trusts of residue:

7. My Trustees shall stand possessed of the residue of the said moneys and the investments for the time being representing the same and such parts of my estate as shall for the time being remain unsold and unconverted (all of which premises are hereinafter referred to as the trust fund) upon the trusts following that is to say:—

one moiety for husband;

(1) My Trustees shall hold one equal moiety of the trust fund UPON TRUST for my said husband absolutely

children's moiety;

(2) As to the remaining moiety of the trust fund (hereinafter called the children's moiety) my Trustees shall until the youngest for the time being of my children living at my death shall attain the age of twenty-one years or marry under that age or die (whichever first happens) pay the income thereof to my said husband for the maintenance education and benefit of my children (whether under the age of twenty-one years or not) or in the event of the death of my said husband before the expiration of the said period shall either pay the same or such part thereof as they think fit to the guardian (if any) of such of my children as shall for the time being be under the age of twenty-one years for the purposes aforesaid or themselves apply the same income or such part thereof as shall not be paid to such guardian for the purposes aforesaid and in all cases without being liable to see to the application thereof PROVIDED nevertheless that this provision shall not apply to the portion of the income attributable to the share to which the children of a child who shall predecease me shall be presumptively

or in expectancy entitled and shall be without prejudice to the statutory power of maintenance in relation thereto (*b*)

(3) Subject as aforesaid my Trustees shall stand possessed of the children's share IN TRUST for all or any my children or child living at my death who attain the age of twenty-five years or marry under that age and the children or child then living of any then deceased child of mine who attain the age of twenty-one years or being female attain that age or marry under that age and if more than one in equal shares as tenants in common but so that the children of any deceased child of mine shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and attained a vested interest

(4) Provided also that if my said husband shall predecease me then the share in the trust fund hereinbefore given to him shall go and accrue to the children's share

(5) In the event of no child or grandchild of mine attaining a vested interest in the children's moiety then my trustees shall hold the children's moiety and the income thereof UPON TRUST for my said husband absolutely if he shall be living at the time of the failure or determination of the trusts hereinbefore declared

ultimate trust for brother;

(6) If the trusts hereinbefore declared shall fail or determine then subject to the trusts powers and provisions hereinbefore declared and contained and to the powers by law vested in my Trustees and to every or any exercise of such powers my Trustees shall hold the trust fund and the income thereof UPON TRUST for my said brother if he shall be living at the time of such failure or determination and if he shall then be dead then UPON TRUST for D absolutely

power of advancement;

(7) My Trustees may (with the consent of my said husband during his lifetime) raise any part or parts not exceeding in the whole a moiety of the then expectant presumptive or vested share of any child or grandchild of mine in the trust fund under the trusts hereinbefore contained and may pay or apply the same for the education advancement or benefit of such child or grandchild in such manner as my Trustees shall think fit

powers of investment, etc.;

(8) Trust moneys may at the discretion of my Trustees (i) be used for the payment of any calls which from time to time become due in respect of any stocks shares or securities not fully paid of which I may die possessed (ii) be invested in any bonus shares which may be allotted to my Trustees in respect of any holding of mine in any company and whether such bonus shares are issued at a premium or fully or partly paid or not and such bonus shares shall (if falling to be treated as capital and not as income) be held as an authorised investment for the purposes of this my will and (iii) be invested in the purchase of or at interest upon the security of such land or immovable property stocks funds shares securities and other investments of whatsoever nature and wheresoever and whether involving liability or not as my Trustees shall in their absolute discretion think fit to the intent that my Trustees shall have the same full and unrestricted power of investing and transposing investments

(*b*) The father will take the income subject to an enforceable obligation to maintain the children: see *Re Rogers*, [1944] Ch. 295. The income of the share of a child dying in the testatrix's lifetime should be excluded, as his or her children would not normally be living with their grandfather.

(including investment in the purchase of freehold or leasehold property) in all respects as if they were absolutely entitled thereto beneficially and I expressly declare that the purchase of a freehold or leasehold house as a residence for a beneficiary is an authorised investment

power of appropriation;

(9) My Trustees as well in their capacity of personal representatives as trustees may in extension of the power of appropriation conferred on personal representatives by section 41 of the Administration of Estates Act 1925 at any time or times at their sole and absolute discretion and without any of the consents made necessary by the said Act appropriate any part of my residuary estate in its then actual condition or state of investment in or towards satisfaction of any legacy or any share in my residuary estate whether or not the same be settled

power to determine questions;

(10) My Trustees may conclusively determine whether any moneys are to be considered as capital or income and whether any expenses and other payments ought to be paid out of capital or income and may determine all questions and matters of doubt arising in the execution of the trusts of this my will or any codicil thereto and every such determination shall be conclusive and binding on all persons claiming thereunder

power of solicitor trustee to charge;

(11) Any executor or trustee being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done by him or his firm in relation to the trusts hereof

power to appoint new trustees.

(12) The power of appointing a new trustee or new trustees hereof shall be vested in my said husband during his life.

IN WITNESS *etc.*

Form 5

Will of Married Man giving Legacies and Income of his Estate During her Life to his Widow Subject to Maintaining his Children, and Subject thereto to his Children Living at her Death and the Issue of then Deceased Children (*a*).

THIS is the last will of me A of *etc.* which I make this —— day of —— 19— hereby revoking all other wills and testamentary dispositions heretofore made by me.

Appointment of executors and trustees.

1. I appoint my wife B and my brother C (hereinafter called "my Trustees") executors and trustees of this my will.

Immediate legacy to wife.

2. I bequeath to my said wife the sum of £x to be paid to her as soon as practicable after my death.

(*a*) It is sometimes desired to postpone vesting of the children's shares until the death of the life tenant. This prevents estate duty being payable on the death of a child in his mother's lifetime. On the other hand, it prevents a child effectively dealing with his or her share though he could raise money on it with a policy. The above precedent may be found useful when it is desired to postpone the ascertainment of the class to take.

[3. *Devise and bequest of residue on trust for sale.*]*

[4. *Trust for payment of debts etc.*]*

[5. *Investment of proceeds.*]*

Trusts of residue:

6. My Trustees shall stand possessed of the residue of the said moneys and the investments for the time being representing the same and such part of my estate as shall for the time being remain unsold and unconverted (all of which premises are hereinafter referred to as "the Trust Fund") upon the trusts and with and subject to the powers and provisions following that is to say:—

income to wife subject to maintenance of children;

(1) UPON TRUST to pay the income of the Trust Fund to my said wife during her life but charged with the maintenance and education of such of my children as shall for the time being be under the age of twenty-one years and unmarried [and also with the maintenance of and provision of a suitable residence for such of my daughters as shall for the time being be of age and spinsters] [and also with the payment to such last-mentioned daughters and to sons who shall have attained the age of twenty-one years and shall not have been married of such yearly or periodical allowances as the Trustees shall in their absolute discretion from time to time in writing direct] but so that the decision of my Trustees as to whether my said wife has performed the obligations hereby imposed upon her shall be final and binding on all persons interested hereunder

trusts for children living at wife's death and issue of deceased children;

(2) After the death of my said wife my Trustees shall stand possessed of the capital and income of the Trust Fund IN TRUST for all or any my children or child living at the death of the survivor of myself and my said wife and the children or child then living of any then deceased child of mine who whether children or grandchildren being male attain the age of twenty-one years or being female attain that age or marry under that age if more than one in equal shares as tenants in common but so that the children of any deceased child of mine shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and my said wife and attained a vested interest

(3) The statutory power of advancement shall apply to the interests of my children and grandchildren in the Trust Fund

(4) If there shall be no child or grandchild of mine who takes a vested interest under the trusts hereinbefore declared then subject to any exercise of the powers by this my will or by law vested in my Trustees the capital and income of the Trust Fund shall be held IN TRUST for all or any my brothers and sisters living at the death of the survivor of myself and my said wife and the children or child then living of any then deceased brothers and sisters of mine who being male attain the age of twenty-one years or being female attain that age or marry under that age and if more than one in equal shares but so that the children or child of any deceased brother or sister of mine shall take (if more than one equally between them) only the share which their parent would have taken had he or she survived me and my said wife.

[7. *Investment clause.*]†

*See clauses 4–6 of previous Form.

†See clauses 8–12 of previous Form.

[8. *Power to appropriate.*]†

[9. *Power to determine questions.*]†

[10. *Power for solicitor-trustee to charge.*]†

[11. *Power to appoint new trustees.*]†

IN WITNESS *etc.*

Form 6

Will of Married Man Providing for the Death of Himself and His Wife in Circumstances in Which it is Uncertain who was the Survivor (*a*).

This is the last will of A *etc.* which I make this —— day of —— 19— hereby revoking all other wills and testamentary dispositions by me heretofore made.

Appointment of wife as executrix if surviving for six weeks.

1. In the event of my wife B surviving me for six weeks then I appoint her sole executrix of this my will.

Legacy to C.

2. I bequeath a legacy of £100 free of duty to C.

Gift of residue to wife.

3. Subject thereto and to the provision hereinafter contained I give devise bequeath and appoint all my real and personal property of every kind to my wife absolutely.

Provision for wife not surviving.

4. In the event of my wife predeceasing me or dying within six weeks of my death then and in that event I appoint my brother D and my brother-in-law E (hereinafter called " my Trustees ") executors and trustees of this my will and the provisions of cls. 5–13 hereof shall have effect.

[5. *General devise and bequest on trust for sale subject to payment of same legacy.*]

[6. *Trust for payment of debts etc.*]

[7. *Investment of proceeds.*]

Alternative trusts of residue.

8. My Trustees shall stand possessed of the residue of the said moneys and the investments for the time being representing the same and such part of my estate as shall for the time being remain unsold and unconverted (all of which premises are hereinafter referred to as the trust fund) upon the trusts following that is to say :—

(1) My Trustees shall pay the income of the trust fund to my sister F during her life so long as she shall remain a widow and from and after her death or remarriage my Trustees shall hold the trust fund and the income thereof upon the trusts following namely

(2) As to one equal third part of the trust fund upon trust for my said sister G absolutely but if she shall predecease me then upon

† See clauses 8–12 of previous Form.

(*a*) This precedent will provide for all cases where it is uncertain whether the testator or his wife survived and is not confined to use during war-time. The presumption where there is no actual evidence of survivorship is that the younger survived; Law of Property Act, s. 184.

The presumption is not confined to death in the same disaster but applies generally, *e.g.*, where one of the spouses dies abroad: see, *e.g.*, *Re Bate* (deceased), *Chillingworth* v. *Bate*, [1947] 2 All E. R. 418. But the possibility of the wife being unable to alter her testamentary dispositions, and also of evidence that she predeceased the testator turning up later, makes such a form of will still desirable.

trust for such of her children as shall survive me and attain the age of twenty-one or marry and if more than one in equal shares absolutely

(3) As to another equal third part of the trust fund upon trust for my sister H but if she shall predecease me then upon trust for such of her children as shall survive me and attain the age of twenty-one years or marry and if more than one in equal shares absolutely

(4) As to the remaining equal third part of the trust fund upon trust for such of them my nephews and nieces as shall survive me and if more than one in equal shares absolutely

(5) Provided always that if the trusts of one or more of the equal third parts of the trust fund shall fail or determine then such equal third part of the trust fund and any share accruing thereto under this present provision shall go and accrue to the other equal third part or parts of the trust fund if more than one in equal shares and be held upon the trusts thereof accordingly.

[9. *Investment clause.*]

[10. *Power to appropriate.*]

[11. *Power to determine questions.*]

[12. *Power for solicitor to charge.*]

[13. *Power to appoint new trustees.*]

In witness *etc.*

Form 7

Appointment of a Trust Corporation to be Custodian Trustee of Land held on Charitable Trusts Together with the Appointment of Additional Managing Trustees and a Conveyance of the Land to the Trust Corporation (*a*).

Parties. This Deed is made the —— day of —— 19— between A of *etc.* B of *etc.* and C of *etc.* (hereinafter called "the Continuing Trustees") of the first part D of *etc.* (hereinafter called "the Retiring Trustee") of the second part The Y Company whose registered office is situate at *etc.* (hereinafter called "the Company") of the third part and E of *etc.* F of *etc.* and G of *etc.* (hereinafter called "the New Trustees") of the fourth part.

Recitals: trust deed. Whereas this Deed is supplemental to a deed of conveyance and declaration of trust (hereinafter called "the Trust Deed") made the —— day of —— between X of the one part and the Continuing and Retiring Trustees of the other part whereby the piece of land situate at —— and therein more particularly described was conveyed

(*a*) Stamp £1. The power conferred by s. 4 of the Public Trustee Act, 1906, to appoint custodian trustees authorises the appointment of a trust corporation to be a custodian trustee of land held on charitable trusts, although the Public Trustee himself could not be so appointed: see *Re Cherry's Trusts*, [1914] 1 Ch. 83.

In most cases trustees of a charity desiring to divest themselves of the charity's property will transfer it to the Official Trustee of Charity Lands. Where for some reason they do not desire to do this, the land can be vested in a trust corporation as custodian trustee which will avoid the difficulties which arise where land held on charitable trusts is held by possibly a considerable number of trustees for a charity and its devolution in the course of time becomes difficult to trace.

to the Continuing Trustees and the Retiring Trustee in fee simple TO HOLD the same upon the charitable trusts thereby declared

AND WHEREAS the Retiring Trustee is desirous of being discharged from the trusts of the trust deed — desire of trustee to retire;

AND WHEREAS the Continuing Trustees and the Retiring Trustee are desirous first of appointing the Company being a trust corporation to be custodian trustee of the trust deed and secondly of appointing the New Trustees to be managing trustees thereof to act jointly with the Continuing Trustees. — desire to appoint custodian trustee.

NOW THIS DEED WITNESSETH as follows:—

1. In pursuance of the said desire the Continuing Trustees and the Retiring Trustee in exercise of the power in this behalf vested in them by section 4 of the Public Trustee Act 1906 and of every or any other power enabling them in this behalf hereby appoint the Company to be custodian trustee of the trust deed. — Appointment of custodian trustee.

2. In pursuance of the said desire the Continuing Trustees and the Retiring Trustee in exercise of the power in this behalf conferred on them by the principal indenture and of every or any other power enabling them in this behalf hereby appoint the New Trustees to be trustees of the trust deed in the place of the Retiring Trustee and as additional trustees for the purposes of the principal indenture or such of the same purposes as are still subsisting and capable of taking effect. — Appointment of managing trustees.

3. The Continuing Trustees and the Retiring Trustee hereby convey (*b*) unto the Company ALL THAT plot of land situate at —— more particularly described in the trust deed TO HOLD the same unto the Company in fee simple as custodian trustee of the trust deed pursuant to the provisions of section 4 of the Public Trustee Act 1906. — Conveyance.

4. The Company hereby consents to act as custodian trustee of the trust deed. — Consent to act.

5. Section 40 of the Trustee Act 1925 shall not apply to this deed.

IN WITNESS *etc.*

Form 8

Assent by a Surviving Executor of one Tenant in Common in Favour of Himself the Sole Surviving Tenant in Common and Declaration that he holds the Property Free from the Statutory Trusts for Sale. Alternative Provisions where the Property was Conveyed on an Express Trust for Sale (*a*).

THIS DEED OF ASSENT AND DECLARATION is made the —— day of —— by A of *etc.*

(*b*) There should be an express conveyance of the land to the trust corporation as it is not clear that on such an appointment s. 40 of the Trustee Act, 1925, would automatically vest the land in the custodian trustee.

(*a*) Stamp £1. Where land is conveyed to two or more persons as joint tenants or tenants in common it vests in them upon the statutory trusts for sale under ss. 34, 35, 36 of the Law of Property Act, 1925, unless it is conveyed to them on an express trust for sale. When, by reason of the death of the other joint tenant or tenant in common, the survivor is absolutely entitled in equity to the proceeds of sale, the trust for sale affecting the property, whether it be the statutory trusts for sale or an express trust for sale, will determine: *Re Cook*, [1948] Ch. 212, as no person can be trustee for himself. Nevertheless, the trust for sale is deemed to be subsisting for

Recitals: conveyance; WHEREAS by a deed of conveyance made the —— day of —— between X of the one part and the said A and B of the other part ALL that piece of land together with the dwelling-house erected thereon known as Blackacre situate at —— and thereon more particularly described was conveyed to the said A and B in fee simple as tenants in common in equal shares [*or* to the said A and B in fee simple and it was thereby declared that the said A and B should stand possessed of the said premises upon trust to sell the same and to hold the net proceeds of sale upon trust for themselves as tenants in common in equal shares]

transitional provisions; AND WHEREAS by virtue of the provisions of the Law of Property Act 1925 the said premises vested in the said A and B upon the statutory trusts for sale as in the said Act provided

will; AND WHEREAS the said B duly made his will dated the —— day of —— and after appointing the said A and C to be executors thereof devised and bequeathed all his real and personal estate to the said A absolutely

death and probate; AND WHEREAS the said B died on the —— day of —— and his said will was on the —— day of —— duly proved in the Principal Probate Registry of the High Court of Justice by the said A and C

death of executor. AND WHEREAS the said C died on the —— day of ——

AND WHEREAS the said A is desirous of assenting to all that the share and interest of B in the proceeds of sale of Blackacre vesting in himself and of determining the said statutory trusts for sale [*or* the said trust for sale].

NOW THIS DEED WITNESSETH as follows:—

Assent. 1. The said A as personal representative of the said B hereby assents to the vesting in himself of ALL THAT the share and interest of the said B in the proceeds of sale of the said premises known as Blackacre situate at —— which said premises are more particularly described in the said conveyance dated the —— day of —— and in the rents and profits thereof until sale to hold unto himself absolutely.

Declaration. 2. The said A hereby declares that the said premises known as Blackacre are vested in himself in fee simple freed and discharged from the said statutory trust for sale [*or* freed and discharged from the said trust for sale arising under the said conveyance dated the —— day of ——].

IN WITNESS *etc.*

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the protection of a purchaser: see s. 23 of the Law of Property Act, 1925, and the survivor can by appointing a new trustee make title under the trust for sale.

Where the surviving joint tenant or tenant in common does not wish to make title under the trust for sale, he can make title by virtue of his beneficial interests without executing any further document. If the property was conveyed to the parties in the first instance as joint tenants in equity there is no objection to such a course, as a purchaser, on proof of the death of the deceased joint tenant, will be prepared to accept title from the survivor, having regard to the proviso to s. 36 (2) of the Law of Property Act, 1925. Where, however, the parties took as tenants in common in equity, the surviving joint tenant will have to satisfy a purchaser how the interest of the deceased tenant in common vested in himself. This is best done by an assent, if no such assent is executed and an assent has to be implied difficulties will arise in establishing that it was ever made. In such a case it is convenient to join in the assent, as is done in this deed, a declaration that the trust for sale, whether statutory or express, has determined.

Form 9

Form of Trust to Pay Income of the Trust Fund to Widow during Her Life but with Power to Trustees to Hand Over the Whole or Part of the Capital of Trust Fund to Widow (*a*).

1. My Trustees shall pay the income of the Trust Fund to my wife during her life.

2. My Trustees in their absolute and uncontrolled discretion may at any time or times when my wife shall not be the sole trustee of this my will and upon her written request pay or transfer to her the whole or any part or parts of the Trust Fund for her own use and benefit.

Form 10

Release by Retiring Partner of Share in Freeholds subject to a Mortgage, the Mortgagee joining to release him from the personal Covenant.

THIS RELEASE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the "Vendor") of the first part B of *etc.* (hereinafter called the "Mortgagee") of the second part and B of *etc.* and C of *etc.* (hereinafter called the "Purchasers") of the third part. Parties.

WHEREAS:— Recitals:

(1) By a conveyance (hereinafter called the "Conveyance") dated *etc.* and made between X of the one part and the Vendor and the Purchasers of the other part certain freehold premises situate at —— in the County of —— known as —— were conveyed by the said X to the Vendor and the Purchasers in fee simple as joint tenants UPON TRUST to sell the same or any part thereof with power to postpone such sale and to stand possessed of the net proceeds of sale (after payment of Conveyance to Partners;

(*a*) This Form is an alternative to Form 2, p. 505, *ante*, and was drafted by Mr. F. Lee-Michell, of Wellington, Somerset, and settled by Mr. E. H. Bodkin, of Lincoln's Inn.

Mr. Lee-Michell writes as follows:—

"The form is suggested for use in cases in which a testator wishes his wife to be able, subject to the check imposed by having to obtain the consent of a trustee or trustees, to deal with the whole of his residuary estate as her absolute property, but also wishes that if any part of the capital of his residuary estate is not required by his wife, it shall not on her death attract estate duty or pass under her will or intestacy, but shall pass under his will.

"There will, it is thought, be no question of the advances to the wife attracting income tax as they are not expressed to be for the purpose of making up income or for maintenance.

"Death duties on the advances cannot, however, as a general rule, be wholly avoided for the reason that as a general rule succession duty will have attached on the testator's death and cannot be got rid of by merger of the life interest—*Att.-Gen.* v. *Chambres*, [1921] 1 K. B. 173.

"Except therefore in cases to which s. 12 of the Legacy Duty Act, 1796, applies and cases in which no legacy or succession duty is payable by reason of s. 58 of the Finance Act, 1910, or for some other reason, provision for the duty on the advances will have to be made by the trustees or the duty will have to be commuted.

"If the form is used by a testator who is not the life tenant's husband, there may possibly be a claim under s. 43 of the Finance Act, 1940, though the better view is that no duty would be payable even if he dies within the five years."

costs) and of the net rents and profits of such part of the same premises as should for the time being remain unsold (after payment of outgoings) [UPON TRUST for the Vendor and the Purchasers as tenants in common in equal shares] [upon the trusts and with and subject to the powers and provisions applicable thereto as part of their partnership property]

Legal charge:

(2) By a legal charge (hereinafter called the "Legal Charge") dated —— *etc.* and made between the Vendor and the Purchasers of the one part and the Mortgagee of the other part the said premises were charged by way of legal mortgage with the payment to the Mortgagee of the principal sum of £x with interest thereon at the rate of £y per cent. per annum and the Vendor and the Purchasers thereby entered into certain joint and several covenants with the Mortgagee for the protection of the security

Property assets of partnership;

(3) [The proceeds of sale of the said premises formed part of the assets of the partnership then subsisting between the Vendor and the Purchasers and under the said partnership the Vendor was at the date of his retirement hereinafter mentioned entitled to a one-third share in the assets thereof]

Retirement of vendor;

(4) The Vendor has retired from the said partnership as from the —— day of —— and the Purchasers continue to carry on the business thereof in co-partnership

Agreement for release of share;

(5) It has been agreed [pursuant to the terms of the said partnership] that the Purchasers shall pay to the Vendor the sum of £z in full satisfaction of his share and interest in the assets of the said partnership and shall as from the date of the Vendor's retirement as aforesaid be entitled to the net rents and profits of the said premises as part of their partnership property

Apportionment for stamp duty;

(6) For the purposes of stamp duty the sum of £w part of the said sum of £z has been apportioned to the estimated value of the said premises valued as free from incumbrances

Vendor's liability for debt;

(7) At the date of his retirement from the said partnership the Vendor was liable thereunder as between himself and the Purchasers for one-third part only of the said principal sum of £x and interest thereon secured by the Legal Charge and at the same date the said principal sum of £x remained owing but all interest had been paid up to such date

Agreement to assign, etc.

(8) It has been agreed that the Vendor should assign to the Purchasers his share and interest in the proceeds of sale of the said premises comprised in the Conveyance and should retire from the trusts declared in relation thereto by the Conveyance and the Mortgagee has agreed to release the Vendor from the covenants in the Legal Charge in manner hereinafter appearing.

NOW THIS DEED WITNESSETH and it is hereby declared as follows:—

Assignment of share.

1. In pursuance of the said agreement and in consideration of the sum of £w now paid by the Purchasers to the Vendor (the receipt and payment of which sum the Vendor hereby acknowledges) the Vendor as BENEFICIAL OWNER hereby assigns and releases unto the Purchasers ALL THAT the one-third part or share and all other (if any) the parts shares or interests to which he may be entitled (whether under the Conveyance or the said partnership) in the proceeds of sale and the

rents and profits until sale of ALL AND SINGULAR the premises comprised in the Conveyance (subject to the Legal Charge as hereinafter varied) TO HOLD the same unto the Purchasers as part of the property of the said partnership subsisting between them alone by reason of the retirement of the Vendor as aforesaid.

Release of vendor by mortgagee.

2. The Mortgagee hereby releases the Vendor his executors and administrators from the said principal sum of £x secured by the Legal Charge and the interest thereon as from the date of his said retirement and from the covenants by the Vendor in and by the Legal Charge contained and implied except the covenants for title to and further assurance of the premises thereby charged PROVIDED that this release shall not operate to release the Purchasers from the said covenants or prejudice or affect the rights and remedies of the Mortgagee against the Purchasers or either of them and the said covenants and other the provisions in the Legal Charge contained or implied shall have effect as if the same covenants had been entered into by the Purchasers alone.

Vendor retires from trust.

3. The Vendor hereby declares that he is desirous of being discharged from the trusts declared by the Conveyance and the Purchasers hereby consent to his retirement accordingly (*z*).

Vesting declaration.

4. The Vendor and the Purchasers hereby declare that the said premises comprised in the Conveyance shall vest in the Purchasers as joint tenants upon the trusts and with and subject to the powers and provisions declared by and contained in the Conveyance or otherwise affecting the same for all the estate immediately prior to the execution of these presents vested in the Vendor and the Purchasers.

Mortgage debt to be paid by purchasers.

5. Without prejudice to the rights and remedies of the Mortgagee the said principal sum of £x and interest thereon shall as from the date of retirement of the Vendor from the said partnership be primarily payable out of the assets of the said partnership continuing between the Purchasers and the Purchasers shall as between themselves be liable for payment thereof in equal shares.

[6. *Certificate as to value if required.*]

IN WITNESS *etc.*

Form 11

Deed of Discharge of a Retiring Partner from a Trust for Sale of Partnership Land (*a*).

Parties.

THIS DEED OF DISCHARGE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the "Retiring Trustee") of the

(*z*) So long as the trust for sale is kept alive the partnership will not be brought onto the title, and a purchaser will not be concerned with its provisions, even if disclosed by the recitals (see Law of Property Act, 1925, s. 27). In some cases the fact that the property is assets of the partnership will have been already disclosed by the conveyance. If preferred, however, the discharge of the retiring partner from the trusts may be effected by a separate deed; see the next precedent.

(*a*) See note (*z*) to last precedent.

The partnership property will either be subject to the statutory trusts, if conveyed to the partners simpliciter or as part of their partnership property, or to an express trust for sale declared by the conveyance.

one part and B of *etc.* and C of *etc.* (hereinafter called the "Continuing Trustees") of the other part.

Recitals:

WHEREAS:—

Conveyance to partners;

(1) This Deed is supplemental to a conveyance (hereinafter called the "Conveyance") dated —— *etc.* and made between X of the one part and the Retiring Trustee and the Continuing Trustee of the other part whereby certain freehold property situate at —— in the County of —— was conveyed to the Retiring Trustee and the Continuing Trustees [as joint tenants as part of their partnership property] (*b*) [UPON TRUST to sell the same or any part thereof with power to postpone such sale and to stand possessed of the net proceeds of sale (after payment of costs) and of the net rents and profits of such part of the same property as should for the time being remain unsold (after payment of outgoings) upon the trusts and with and subject to the powers and provisions applicable thereto as part of their partnership property]

desire to retire.

(2) The Retiring Trustee is desirous of retiring from the [statutory trusts affecting the said property by reason of the Conveyance] [trusts declared by the Conveyance].

NOW THIS DEED WITNESSETH as follows:—

Declaration of desire to be discharged.

1. The Retiring Trustee hereby declares that he is desirous of being discharged from the [aforesaid statutory trusts affecting the said property comprised in the Conveyance] [trusts declared by the Conveyance] and the Continuing Trustees hereby consent to his retirement accordingly.

Vesting declaration.

2. The Retiring Trustee and the Continuing Trustees hereby declare that the said property comprised in the Conveyance shall vest in the Continuing Trustees as joint tenants upon the [statutory trusts aforesaid] [trusts and with and subject to the powers and provisions declared by and contained in the Conveyance or otherwise affecting the same] for all the estate immediately prior to the execution of this Deed vested in the Retiring Trustee and the Continuing Trustees.

IN WITNESS *etc.*

Form 12

Option to take a long Lease of Business Premises the tenant being authorised to apply for development permission to the Planning Authority and undertaking to pay any development charge under the Town and Country Planning Act, 1947 (*a*).

Parties.

AN AGREEMENT made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Landlord" which expression where the context

(*b*) Where the property has been conveyed in this form to the partners or to them simply as joint tenants, whether prior to or after January 1, 1926, it will become vested in the partners upon the statutory trusts under the Law of Property Act, 1925, First Schedule, Part IV, 1 (1), or ss. 34 or 36:: *Re Fuller's Contract*, [1933] Ch. 652.

(*a*) Stamp 6d. A planning authority and the Central Land Board are generally prepared to grant development permission and fix the development charge before a lessor and lessee have entered into any lease. This option is to enable an intending lessee to open negotiations with the planning authority for the necessary planning permission to do what he requires to do on the land. If the permission is refused or the land charge is too high he need not exercise the option.

so admits shall include his successors in title) of the one part and B of *etc.* (hereinafter called "the Tenant" which expression where the context so admits shall include his successors in title) of the other part.

WHEREBY IT IS AGREED as follows :—

Grant of option.

1. In consideration of the sum of £—— paid by the Tenant to the Landlord (the receipt whereof the Landlord hereby acknowledges) the Tenant shall have the option of taking a lease of the premises known as —— situate at —— in the County of —— more particularly described in the draft lease in the schedule hereto for a term of —— years at the yearly rent of £——.

Term for exercise of option.

2. The said option shall be exercisable by notice in writing to the Landlord at any time within —— months from the date hereof and if and when the same shall be exercised then the Landlord shall grant and the Tenant shall accept a lease of the said premises for the said term (such term to commence from the date of the exercise of the said option) or in the event of the Landlord at such date still requiring possession of the said premises for his own business at such later date as the Landlord may give up possession thereof but so that the Landlord shall give up possession within a period of not longer than six months from the date of the exercise of such option.

Form of lease.

3. The lease shall be in the form and contain the covenants and provisions set forth in the schedule hereto.

Title of landlord.

4. The Tenant shall assume the Landlord's title to grant the lease without further evidence investigation or objection.

Existing development and user.

5. The Tenant being aware of the state of development of the property and of the use of the premises on the 1st day of July 1948 shall require no evidence and make no requisition in respect thereof and the Landlord undertakes not to develop the property or to change such use during the continuance of this option.

Tenant's right to apply for development permission.

6. Prior to the exercise of the option hereby conferred the Tenant shall be at liberty to apply for and obtain permission from the planning authority to develop the said premises and to carry on operations thereon and to change the user thereof in any manner permitted by the draft lease in the schedule hereto In the event of a development charge becoming payable under the Town and Country Planning Act 1947 or otherwise in respect of any operation or change of user for which such permission is obtained the Tenant will pay such development charge and shall on the request in writing of the Landlord but at the cost of the Tenant enter into such covenant as the Landlord may reasonably require to indemnify the Landlord against such charge and to observe and perform the conditions on which such permission has been granted and not without the consent in writing of the Central Land Board or other appropriate authority to start such operations or change such user until the amount of such charge has been paid or secured to the satisfaction of the said Board.

Preparation of lease.

7. In the event of the option being exercised the lease and a counterpart thereof shall be prepared by the Landlord's solicitors at the expense (including stamps) of the Tenant and shall be executed by the Landlord and Tenant respectively whenever required by either party after the date of the exercise of this option and from such date until the

execution of the lease the parties shall be bound by the covenants and agreements to be contained therein as if the same had been actually executed.

Costs.

8. The costs of and attending the negotiation for and the preparation execution and stamping of this agreement in duplicate shall be borne by the Tenant and paid forthwith.

AS WITNESS *etc.*

THE SCHEDULE

[*To contain the draft lease.*]

Form 13

Power of Appropriation for Use in Wills and Settlements (*a*).

1. WILLS

My Trustees as well in their capacity of personal representatives as trustees may in extension of the power of appropriation conferred on personal representatives by section forty-one of the Administration of Estates Act 1925 at any time or times at their sole and absolute discretion and without any of the consents made necessary by the said Act appropriate any part of my residuary estate in its then actual condition or state of investment in or towards satisfaction of any legacy or any share in my residuary estate whether or not the same be settled.

2. PERSONALTY SETTLEMENTS

The Trustees may exercise the powers of appropriation conferred on personal representatives by section forty-one of the Administration of Estates Act 1925 without any of the consents which would be requisite for the exercise thereof by personal representatives.

(*a*) It is always advisable to insert an express power of appropriation in wills and settlements where there is any likelihood of a division or appropriation of investments between beneficiaries being necessary. The statutory power will apply to wills so long as the personal representatives remain such. This power, however, is exercisable only with the consent of the beneficiary, or the trustee or life-tenant of a settled share; and such consent was held in *Jopling* v. *Commissioners of Inland Revenue*, [1940] 2 K. B. 282 to render the appropriation a sale so as to make *ad valorem* stamp duty chargeable on the transfers. It is therefore advisable to insert an express power, negativing the necessity of consent, which will apply to the trustees both in their capacity as executors and trustees; and the same applies to settlements on trust for sale and settlements of personalty. The statutory will forms contain a power of appropriation without consent, but this can only be incorporated expressly; the advisability of negativing consent seems to have been overlooked in some precedents.

Form 14

Short Form of Agreement for Letting of Agricultural Land for Grazing Purposes, Framed with a View to Excluding as far as possible the Provisions of the Agricultural Holdings, Act, 1948. (*a*)

(*Drafted by Dennis B. Pugh, Barrister-at-Law*)

AN AGREEMENT made this —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Owner") of the one part and B of *etc.* (hereinafter called "the Tenant") of the other part WHEREBY IT IS AGREED AND DECLARED as follows:— Parties.

1. The Owner agrees to let and the Tenant agrees to take ALL THAT meadow or pasture land known as *etc.* EXCEPTING AND RESERVING unto the Owner (*here insert such reservations of rights of way etc. as may be appropriate*). Parcels and Reservations.

THE TENANCY to be from the 1st day of —— to the 31st day of —— 19— (*b*) AT THE MONTHLY RENT of £—— payable on the first day of each month the first of such payments to be made on the 1st —— next. Term and Rent.

2. THE TENANT hereby agrees with the Owner as follows:— Tenant's obligations:

(i) That he will pay the said rent at the times and in manner aforesaid without any deduction (except for land tax and landlord's property tax) to pay rent;

(ii) That he will not at any time plough break up pare burn or convert into tillage the said meadow or any part thereof but that he will use the same for the purpose of grazing livestock and for no other purpose whatsoever to use for grazing purposes only;

(iii) That he will not damage or destroy any of the hedges or fences but will maintain the same in a sound and stockproof condition maintain hedges;

(iv) That he will not permit any livestock to stray on to any adjoining land prevent stock straying;

(v) That he will not erect any building whether permanent or temporary on the said meadow or on any part thereof not to erect buildings;

(*a*) The Agricultural Holdings Act, 1923, applied only to tenancies from year to year or for a longer period, and consequently that Act could be evaded by the granting of a 364-day tenancy; see *Land Settlement Association, Ltd.* v. *Carr*, [1944] 1 K. B. 657. S. 2 (1) of the Act of 1948 closes that loophole by providing that where any land is let to a person for use as agricultural land for an interest less than a tenancy from year to year, or a person is granted a licence to occupy land for such use, and the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant of an agricultural holding, then, unless the letting or grant was approved by the Minister before the agreement was entered into, the agreement is to take effect, with the necessary modifications, as if it were an agreement for the letting of the land for a tenancy from year to year, with the result that the tenant would be afforded all the protection of the Act. The sub-section contains a proviso, however, that such sub-section is not to have effect in relation to an agreement for the letting of land, or the granting of a licence to occupy land, made (whether or not the agreement expressly so provides), in contemplation of the use of the land only for grazing or mowing during some specified period of the year; and the sub-section also excludes the sub-tenants or sub-licensees of such a tenant or licensee. By sub-section (2) any dispute as to the operation of the section in relation to any agreement is to be determined by arbitration under the Act.

The words "specified period of the year" are not defined, but it is apprehended that they would imply the months during which the land is usually grazed in the locality in question, or the right to one year's hay crop.

The above form contemplates a letting for grazing purposes, but can easily be adapted to the case of a letting or licence for mowing.

(*b*) Here insert the specified period of the year.

clear ditches; (vi) That he will keep the ditches clear and free from obstruction

preserve trees; (vii) That he will preserve all trees from bite of cattle or other injury and that he will not cut down fell or destroy or lop or top the same

(viii) That he will keep the said meadow free from pests and injurious weeds

not to assign; (ix) That he will not assign underlet or part with possession of the said meadow or any part thereof or take in the livestock of any other person to graze thereon

yield up. (x) That he will at the determination of the tenancy hereby granted quietly yield up the said meadow with the hedges and fences thereon in a sound and stockproof condition and the ditches free from obstruction.

Quiet enjoyment. 3. The Owner hereby agrees with the Tenant that the Tenant paying the rent hereby reserved and performing and observing the agreements on his part herein contained shall peaceably hold and enjoy the said meadow without any interruption or disturbance by the Owner or any person rightfully claiming under him.

Proviso for re-entry. 4. If the rent hereby reserved or any part thereof shall be in arrear for 14 days after the same shall have become due (whether demanded or not) or in the event of the breach of any of the agreements on the part of the Tenant herein contained the Owner may re-enter on the said meadow.

Exclusion of Agricultural Holdings Act, 1948. 5. It is hereby further agreed and declared that this agreement shall be deemed to be an agreement for the letting of land made in contemplation of the use thereof only for grazing during a specified period of the year and that accordingly the provisions of the Agricultural Holdings Act 1948 shall not be applicable hereto.

As witness *etc.*

Form 15

Assent by Executors in Favour of One of Themselves who is also Devisee. Express Covenant for Production of the Probate.

Parties. This Assent is made the —— day of —— 19— between A of *etc.* B of *etc.* and C of *etc.* (hereinafter collectively referred to as "the Executors) of the one part and the said C (hereinafter called "the Beneficiary") of the other part.

Recitals; Whereas :—

will of testator; (1) X late of *etc.* (hereinafter called "the Testator") being at his death estate owner in respect of the fee simple in the property short particulars whereof are contained in the Schedule hereto duly made his will dated the —— day of —— 19— and thereby appointed the Executors to be the executors thereof

death and probate; (2) The Testator died on the —— day of —— 19— without having revoked or altered his said will which was on the —— day of —— 19— duly proved by the Executors in the —— Probate Registry

payment of duties; (3) All duties which became payable on the Testator's death in respect of the said property have been discharged

[(3) Arrangements have been made for discharging the duties which became payable on the death of the Testator in respect of the said property]

(4) The Beneficiary has requested the Executors to vest in him the legal estate in the said property. request for assent.

NOW IT IS HEREBY DECLARED as follows :— Assent.

1. The Executors AS PERSONAL REPRESENTATIVES of the Testator hereby assent to the vesting in the Beneficiary of ALL THAT the property described in the said Schedule hereto [and all other (if any) the property interests and rights vested in the Executors as such executors as aforesaid which ought to be vested by this assent] (*a*) for an estate in fee simple [subject to the statutory charge for securing the said duties].

2. The Executors hereby declare that they have not as such executors as aforesaid made or executed any previous assent or conveyance in respect of the legal estate in the premises or any part thereof. Declaration of no previous assent.

3. The said A and B hereby acknowledge the right of the Beneficiary to production of the said probate of the said will of the Testator and the delivery of copies thereof and if and so far as such acknowledgment may not have statutory effect each of them so far as relates to the acts and defaults of himself and his own personal representatives and so as to bind himself and his personal representatives only so long as the probate of the said will of the Testator is [in his possession or under his control] [in his or their actual custody] and not further or otherwise and with the intent so far as may be to bind the said probate into whosesoever hands the same may come hereby covenants with the Beneficiary and the persons deriving title under him that he or his personal representatives will (unless prevented by fire or other unavoidable accident) upon the reasonable request in writing and at the cost of the Beneficiary or the persons deriving title under him produce the said probate or cause the same to be produced at all reasonable times to him or them or to his or their solicitor or agent or any person appointed by him or them for the purpose of inspection and comparison with abstracts or copies thereof and will produce or cause the same to be produced in the course of any judicial proceedings or otherwise for the proof or support of the title or claim of the Beneficiary or the persons deriving title under him or any other purpose relative thereto And will also at the like request and cost deliver to the Beneficiary or the persons deriving title under him such true attested or unattested copies of the said probate and all endorsements thereon as he or they may require [And will in the meantime keep the said probate safe whole undefaced and uncancelled unless prevented by fire or other inevitable accident] (*b*). Covenant for production of probate.

AS WITNESS *etc.*

(*a*) These general words are advisable when the assent relates to property passing under a residuary devise, as further property or rights may be found afterwards to have belonged to the testator.

(*b*) These words in square brackets should not be added unless the words "in his or their actual custody" in square brackets above are used. Where the latter are inserted, the liability for safe custody will not arise when the probate is in the hands of an agent, and the executors may then safely give the covenant. A covenant, so limited, was usually given by fiduciary owners prior to the Conveyancing Act, 1881. The statutory form of undertaking for safe custody on the other hand, should not be given by executors, as it would render them liable for loss by an agent. An express covenant for production appears to be necessary in the present case. The better view is that an acknowledgment having statutory effect under s. 64 of the Law of Property Act,

Form 16

Conveyance by Executors to One of Themselves Purchasing under an Option in the Will.

Parties. THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* B of *etc.* and C of *etc.* (hereinafter collectively referred to as "the Vendors") of the one part and the said C (hereinafter called "the Purchaser") of the other part.

Recitals; WHEREAS:—

will of testator; (1) X late of —— in the County of —— (hereinafter called "the Testator") being at his death seised in fee simple in possession free from incumbrances of the property hereinafter described duly made his will dated the —— day of —— 19— and thereby after appointing the Vendors to be the executors and trustees thereof declared that the Purchaser notwithstanding he was a trustee should have the option of purchasing the said property at the price of £—— [at a valuation to be made for the purpose by a valuer appointed by his said trustees] such option to be exercisable by the Purchaser giving notice in writing to the other trustees of his desire to purchase the same within six months after his (the Testator's) death and the Testator thereby directed his trustees on payment of the purchase money to assure the said property to the Purchaser or as he should direct

notice to exercise option; (2) By notice in writing dated the —— day of —— 19— the Purchaser gave notice to the said A and B of his desire to purchase the said property and requested them to join in conveying the same to the Purchaser

valuation. [(3) The Vendors have pursuant to the directions in the said will caused the said property to be valued for the purposes of the said option by Messrs. —— who have valued the same at the sum of £—— (*a*)].

NOW THIS DEED WITNESSETH as follows:—

Conveyance. 1. Pursuant to the said option and in consideration of the sum of £—— on or before the execution of these presents paid by the Purchaser to the Vendors as such personal representatives as aforesaid (the receipt and payment of which sum the Vendors hereby acknowledge) the Vendors as PERSONAL REPRESENTATIVES of the Testator hereby grant and convey unto the Purchaser ALL THAT *etc.* TO HOLD unto the Purchaser in fee simple.

Declaration of no previous assent. 2. The Vendors hereby declare that they have not as such personal representatives as aforesaid previously to their execution of

1925, cannot be given by executors or trustees to one of themselves. Such an acknowledgment must be given to "another", and must, it seems, be given by all the persons who retain possession of the documents. Consequently executors, having joint possession of the probate, could not give an acknowledgment having statutory effect to one of themselves; nor would it be valid as a covenant at common law. S. 82 of the Law of Property Act, 1925, which validates covenants or agreements entered into by a person with himself and others, does not apply to covenants or agreements by several persons with one of themselves. The acknowledgment might therefore operate neither under the statute nor as a covenant, and it is better for the executors other than the devisee to give the latter an express covenant. This will so far as possible bind the probate in the hands of other persons. In the less common case where a sole executor assents in favour of himself and others, *e.g.*, as tenants in common on trust for sale, an ordinary acknowledgment would probably be effective as a covenant or agreement.

(*a*) The probate valuation is always a knock-down price and is hardly fair to the other beneficiaries.

these presents made or executed any assent or conveyance in respect of the legal estate in the property hereinbefore conveyed or any part thereof.

[3. *Covenant for production and custody of documents; adapt clause 3 of last Precedent.*]

[4. *Certificate as to value if required.*]

IN WITNESS *etc.*

Form 17

Conveyance by Personal Representatives of a Tenant for Life under a Will on whose Death the Settlement came to an End. Variations where No Vesting Assent was made (*a*).

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Vendors") of the one part and C of *etc.* (hereinafter called "the Purchaser") of the other part. Parties.

WHEREAS :— Recitals;

(1) D late of —— in the County of —— being at his death seised of the legal estate in fee simple in the property hereinafter conveyed died on the —— day of —— 19— having by his will dated the —— day of —— 19— appointed the Vendors to be executors thereof [intestate] death of tenant for life;

(2) On the —— day of —— 19— probate of the said will including settled land [letters of administration to the estate of the said D] was granted out of the —— Probate Registry to the Vendors probate;

[(1) X late of —— in the County of —— being at his death estate owner in respect of the fee simple in possession free from incumbrances in the property hereinafter conveyed duly made his will dated the —— day of —— 19— and thereby after appointing E and F to be executors and trustees thereof devised to them the said property UPON TRUST to pay the rents and profits thereof to D and his assigns during his life and after his death upon trust as therein mentioned will of testator;

(2) The said X died on the —— day of —— 19— without having revoked or altered his said will which was on the —— day of —— 19— proved by the said E and F in the principal Probate Registry death and probate;

(3) On the 1st day of January 1926 the legal estate in fee simple in the said property became by virtue of the Transitional Provisions of the Law of Property Act 1925 and the Settled Land Act 1925 vested in the said D by reason of the said E and F having let the said D into possession or receipt of the rents and profits thereof and having assented to the said devise vesting of estate in tenant for life;

(4) Death of D and (Grant of Probate or Letters of Administration as in (1) and (2) above)]

(*a*) Where the settlement comes to an end on the death of the tenant for life a general grant of probate or letters of administration will be granted to his general personal representatives. This grant would, under the decision in *Re Bridgett and Hayes' Contract*, [1928] Ch. 163, be valid in favour of a purchaser even if in fact it should have been made to trustees of the settlement or special personal representatives appointed by will. A purchaser is therefore not concerned to see that the settlement has come to an end.

agreement for sale.

(3) The Vendors as such personal representatives as aforesaid in exercise of their statutory powers in that behalf have agreed with the Purchaser for the sale to him of the estate in fee simple in the said property free from incumbrances for the sum of £——.

Conveyance.

Now this Deed witnesseth as follows:—

1. In pursuance of the said agreement and in consideration of the sum of £—— on or before the execution of these presents paid by the Purchaser to the Vendors as such personal representatives as aforesaid (the receipt and payment of which sum the Vendors hereby acknowledge) the Vendors as personal representatives of the said D hereby convey unto the Purchaser all that *etc.* to hold the same unto the Purchaser in fee simple.

Parcels and Habendum.

Declaration of no previous assent.

2. The Vendors hereby declare that they have not as such personal representatives as aforesaid previously to their execution of these presents made or executed any assent or conveyance in respect of the legal estate in the property hereinbefore conveyed or any part thereof.

Acknowledgment for production of documents.

3. The Vendors hereby acknowledge the right of the Purchaser to the production of the documents mentioned in the Schedule hereto the possession whereof is retained by them and to delivery of copies thereof.

[4. *Certificate as to value if required.*]

In witness *etc.*

The Schedule above referred to.

[*Particulars of documents including probate retained by the Vendors.*]

Form 18

Deed Declaring Trusts of a Fund Raised to Assist Widow and Children of Man Killed in an Accident (*a*)

Parties.

This Declaration of Trust made the —— day of —— 19— by A of *etc.* and B of *etc.* (hereinafter called "the Trustees" which expression shall include the Trustees or Trustee for the time being hereof)

Recitals:

Whereas—

details to suit facts of case;

1. X of *etc.* was employed by the Y Company Ltd. whose registered office is at *etc.* (hereinafter called "the Company") but as a result of an accident died on the —— day of —— 19— leaving him surviving a widow —— and three infant children, namely, —— (which infant children are hereinafter called "the Beneficiaries").

raising of fund and investment.

2. The Company and its employees have provided a fund for the purposes of assisting the said [widow] in bringing up and giving a start in life to the Beneficiaries and the Trustees have caused the same to be invested in the purchase in the names of the Trustees of £—— . . . stock and desire that the trusts of the said fund (hereinafter called "the Trust Fund") shall be declared in manner hereinafter appearing.

(*a*) This form was drafted by Mr. P. S. Brown, of Preston. Stamp *ad valorem* settlement duty of £2 per cent. is payable and it must be adjudicated.

NOW THIS DEED WITNESSETH as follows :— Witnesseth.

1. The Trustees shall hold the Trust Fund Upon trust that they shall either retain the same in its present state of investment or at their discretion realise the same and invest the proceeds in any investments hereby authorised and may from time to time at their like discretion transpose such investments into others hereby authorised. Investment: power to change.

2. The Trustees shall apply the whole or such part as they in their discretion think fit of the income of the Trust Fund for or towards the maintenance education and benefit of the Beneficiaries or any of them until they shall attain the age of twenty-one years or being female attain that age or marry and may either themselves apply the same or may pay the same to their mother [the widow] or their guardian for the time being without seeing to the application thereof. Application of income.

3. The Trustees shall during the period aforesaid accumulate the surplus (if any) of the said income by way of compound interest by investing the same and the resulting income thereof in any of the investments hereby authorised in augmentation of the capital of the Trust Fund and for the benefit of the person or persons who shall eventually become entitled thereto but the Trustees may in their discretion apply the accumulation of any preceding year or years in or towards the maintenance and education of the Beneficiaries or any one or more of them in the same manner as if it had been income resulting from the Trust Fund in the current year subject thereto the Trustees shall hold the Trust Fund and any accumulations thereto Upon Trust for all or any of the Beneficiaries who attain the age of twenty-one years or being female attain that age or marry and if more than one in equal shares as tenants in common. Accumulate surplus income. Trusts of fund.

4. The Trustees may raise the whole or any part or parts of the capital of any share to which any Beneficiary being a minor and if a female also a spinster shall or if of full age being a male or if of full age or married being a female would for the time being be entitled under this Trust Deed and may pay or apply the same for his or her advancement or benefit as the Trustees shall think fit. Advancement of a beneficiary's share.

5. The Trustees may at their discretion apply all or any part of the income applicable hereunder for the maintenance or education or benefit of the Beneficiaries in or towards providing a suitable residence and keeping up an establishment for the Beneficiaries or any of them and for that purpose may take on lease or from year to year any proper dwellinghouse and may defray all expenses connected therewith or with the establishment to be kept up therein and may also at their discretion permit any adult Beneficiary to share the benefit of such residence and establishment either with or without contributing towards the expenses thereof and upon such terms as to the contribution (if any) to be made by such adult Beneficiary and in all other respects as the Trustees may think fit. Expend money for upkeep of a residence.

6. If and so far as the trusts aforesaid fail or determine the Trustees shall hold the Trust Fund subject as aforesaid in trust to assist the employees of the Company as the Directors may in their absolute discretion determine. Ultimate trust on failure of previous trusts.

7. The power of appointing new trustees hereof shall be vested in the Directors for the time being of the Company provided nevertheless that such trustees shall consist of the persons for the time being Appointment of new trustees.

holding the offices in the Company specified in the Schedule hereto and on ceasing to hold such office such trustee shall retire from the trusts hereof and his successor shall be the person succeeding to his office and Provided always that if any office or offices mentioned in the said Schedule hereto shall cease to exist then the Directors of the Company may appoint such person or persons to fill the vacancy in the trusteeship as they may think fit.

Investment.

8. Investment clause.

Protection to trustee for certain losses.

9. No Trustee purporting to act in the execution of the trusts and powers hereof shall be liable for any loss not attributable to his own dishonesty or to the wilful commission or omission by him of any act known by him to be a breach of trust and in particular he shall not be bound to take any proceedings against a co-trustee for any breach or alleged breach of trust committed by such co-trustee.

Easing administration of trust when a trustee away, etc.

10. (i) Any of the powers and authorities hereby given to or vested in the Trustees may at any time be exercised by a majority of the Trustees without the concurrence or with merely the formal concurrence of any Trustee who by reason of illness infirmity or temporary absence abroad may be unable or unable without inconvenience to take an active part therein and such trustee may in order to facilitate business by power of attorney or otherwise empower any of the other trustees to use his or her name for execution or signature of documents for any of the purposes of this Trust without being responsible for loss and all acts and proceedings of the majority of the Trustees shall in such case be as valid and effectual as if they had all concurred therein

Decision of majority to prevail.

(ii) Any Trustee who shall dissent from any exercise of any such powers or authorities shall nevertheless concur in executing or signing any document or doing any act necessary for giving effect to the exercise of any of such powers or authorities by the majority of the Trustees without being responsible for loss.

Receipts by minor on her marriage.

11. It is hereby declared that the receipt of any female Beneficiary who shall have married shall notwithstanding her minority be a sufficient discharge for capital and income to which she is entitled hereunder.

IN WITNESS *etc.*

THE SCHEDULE before referred to.

Qualification office of Trustee.

Form 19

Instruments relating to Special Powers.

I

Appointment by Husband and Wife under a Power in their Marriage Settlement of an Aliquot Share of the Funds to a Son (*a*).

THIS APPOINTMENT made by us A of *etc.* and B his wife WITNESSETH that in exercise of the power in that behalf conferred on us by a

(*a*) Notice in writing of the appointment should be given to the trustees of the settlement. It is assumed that all the children have attained vested interests in default of appointment so that the son's share in default of appointment cannot be increased.

settlement dated *etc.* and made between *etc.* (being a settlement made in consideration of our marriage) and of all other powers We hereby irrevocably appoint that one —— share of the investments and property now subject or which may by any means become subject to the trusts of the said settlement [including the sum of £—— already advanced to our son C] shall (subject to our respective life interests therein) be held by the trustees for the time being thereof IN TRUST for our son C absolutely And declare that this Appointment shall not prejudice the power of varying investments in the said settlement in relation to such share.

IN WITNESS *etc.* (*b*).

II

Appointment by Husband and Wife under a Power in their Marriage Settlement of a Sum of Cash to a Daughter on her Marriage (*c*).

THIS APPOINTMENT made by us A of *etc.* and B his wife WITNESSETH that in exercise of the power in that behalf conferred on us by our marriage settlement dated *etc.* and of all other powers We hereby in consideration of the now intended marriage between our daughter C with D irrevocably appoint that the trust funds now subject or which may by any means become subject to the trusts of the said settlement shall (without prejudice to our respective life interests therein) immediately upon solemnisation of the said intended marriage stand charged with the payment of the net sum of £—— to the said C for her absolute benefit such sum to be raised and paid to the said C immediately upon the death of the survivor of us free of all deductions for the costs of raising the same and the duties which may become payable thereon on our respective deaths (which costs and duties shall be discharged out of the residue of the said trust funds) and to bear interest at the rate of £—— per cent. per annum from the death of the survivor of us until actual payment thereof PROVIDED that if the said now intended marriage of the said C with D shall not be solemnised within 6 months from the date hereof this Appointment shall be wholly void and of no effect.

IN WITNESS *etc.*

III

Appointment by Surviving Parent under a Power in her Marriage Settlement of a Sum of Stock, the Appointor settling it on her Daughter's Marriage and Releasing her Life Interest (*d*).

THIS APPOINTMENT is made by A of *etc.* widow (hereinafter called "the Appointor") WHEREAS :— Recitals;

(1) This Appointment is supplemental to a settlement (hereinafter called "the Settlement") dated *etc.* and made between *etc.* being a settlement made in consideration of the marriage then intended and shortly afterwards duly solemnised between B and the Appointor supplements to settlement;

(2) The said B died on the —— day of —— 19— without having joined with the Appointor in exercising the joint power of appointment conferred on them by the Settlement death of husband;

(*b*) The testimonium will contain the date of execution.
(*c*) See Note (*a*) to Precedent 1.
(*d*) See Note (*a*) to Precedent 1.

desire to appoint.

(3) The Appointor is desirous of making such appointment in contemplation of the now intended marriage of C (a daughter of the said A and B) with X as is hereinafter contained.

NOW THIS DEED WITNESSETH as follows:—

Appointment of stock on trust.

1. In exercise of the power in that behalf conferred on her by the Settlement as having survived the said B and of all other powers the Appointor hereby irrevocably appoints that the sum of £—— 3 per cent. Treasury Stock part of the sum of £—— Treasury Stock now forming part of the funds subject to the trusts of the said Settlement shall from and after the solemnisation of the said now intended marriage of the said C be held free of all duties which may become payable in respect thereof on the death of the Appointor (which duties shall be paid out of the residue of the investments and property held on the trusts of the Settlement) upon the trusts following that is to say UPON TRUST to pay the income thereof to the said C during her life And after her death as to the capital and future income thereof IN TRUST for the children or child of the said C who shall be born during the life of the Appointor and shall attain the age of 21 years or being female marry under that age and the children or child of the said C who shall be born after the death of the Appointor and shall be living at the expiration of 21 years from the death of the Appointor or in the case of daughters shall have previously married and if more than one in equal shares as tenants in common (*e*) [And the Appointor hereby further appoints that for the purposes of the hotchpot provision contained in the Settlement the said sum of stock shall be taken as of the value of £——].

Surrender of life interest.

2. In consideration of the said now intended marriage the Appointor hereby assigns and surrenders unto the said C (*f*) ALL THAT the life interest of the Appointor under the Settlement in the said sum of £—— Treasury Stock hereinbefore appointed to the end and intent that the same may forthwith merge in the reversionary interest in the said sum of stock.

Avoidance if marriage not solemnised

3. If the said now intended marriage of the said C shall not be solemnised within six months from the date hereof this Appointment and everything therein contained shall be wholly void for all purposes.

IN WITNESS *etc.*

IV

Appointment by Father under a Power in a Voluntary Settlement of a Sum of Cash to a Son and Surrender of his Life Interest, provision being made for Retainer of Sufficient Investments to Answer Claims for Duty (*g*).

Parties.

THIS APPOINTMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Appointor") of the first part

(*e*) This includes as many of the children of the daughter as possible without offending the rule against perpetuities. Apart from the words in square brackets the stock would have to be valued for hotchpot at the date of the death of the life tenant.

(*f*) The fact that the consideration for the surrender is the daughter's marriage will not prevent estate duty being chargeable if the mother dies within five years: Finance Act, 1940, s. 43; Finance Act, 1946, s. 47. *Ad valorem* stamp duty, however, will not be payable.

(*g*) Succession duty at the appropriate rate will be payable on the death of the husband notwithstanding the surrender, as succession duty attaches on the execution of the settlement and cannot be got rid of by any subsequent dealing. This, however,

B of *etc.* (hereinafter called "the Son") of the second part and C of *etc.* and B of *etc.* (hereinafter called "the Trustees") of the third part.

WHEREAS:— Recitals;

(1) This Appointment is supplemental to a Settlement (hereinafter called "the Settlement") dated *etc.* and made between E the father of the Appointor of the one part and the Trustees of the other part whereby certain investments transferred to the Trustees were settled upon trusts for payment of the income thereof to the Appointor during his life and after his death for the children or remoter issue of the Appointor or some or one of them in such shares and manner as he should by any deed or deeds revocable or irrevocable appoint and in default of and subject to any such appointment in trust for the children of the Appointor by any marriage as therein mentioned with the usual hotchpot provision settlement;

(2) The Appointor is desirous of making such appointment and surrender in favour of the Son (who is the son of the Appointor by his marriage with ——) as are hereinafter contained. desire to appoint and surrender life interest.

NOW THIS DEED WITNESSETH as follows:—

1. In pursuance of the aforesaid desire and in exercise of the power in that behalf conferred on him by the Settlement and of all other powers the Appointor hereby appoints that the sum of £—— shall forthwith be raised out of the investments and property subject to the trusts of the Settlement and shall (after deduction therefrom of the costs of raising the same) be held IN TRUST for the Son absolutely subject nevertheless to the duties payable in respect thereof on the death of the Appointor. Appointment of sum of cash to son.

2. For the purpose of enabling the said sum to be raised and immediately transferred to the Son the Appointor hereby assigns and surrenders unto the Son his life interest in the same sum under the Settlement to the end and intent that the same may forthwith merge in the reversionary interest therein. Surrender of life interest.

3. (1) The Son and the Appointor hereby direct the Trustees to commute and pay out of the said sum of £—— the succession duty (if any) payable on the death of the Appointor in respect thereof and further authorise them to retain such part of the investments appropriated to the said sum of £—— as may in the opinion of the Trustees or of the Commissioners of Inland Revenue be sufficient to answer any estate duty which may become payable in respect of the said sum of £—— by reason of the death of the Appointor within 5 years of the date hereof Provisions for duties on father's death.

(2) The said estate duty and the costs of raising or commuting the same shall be a first charge upon the investments so retained and

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can be commuted and paid at once. If, however, the life tenant's estate is less than £15,000, no succession duty will be payable. If this is likely, it is better to set aside a fund to assure the succession duty, as if commuted, it will not be repaid in any event Estate duty will also be payable if the husband dies within five years of the surrender. This cannot be commuted, as the rate depends upon aggregation with his free estate; and it is therefore necessary for the protection of the trustees to retain a sufficient sum to answer duty at any rate which is reasonably likely to be payable. It is understood, however, that the Commissioners are prepared to release trustees from liability over and above an agreed sum calculated having regard to the estate and prospects of the tenant for life, while reserving their rights against the beneficiaries.

subject thereto the said investments shall be held by the Trustees IN TRUST for the Son absolutely.

IN WITNESS *etc.*

V

Appointment by Father by Deed endorsed under Power in his Marriage Settlement in Favour of the Children in Unequal Shares (*h*).

Recital of death of wife without appointing.

THIS APPOINTMENT is made by the within named A

WHEREAS the within named B died on the —— day of —— 19— without having joined with the said A in exercising the joint power of appointment conferred on them by the within written Settlement.

Appoint to children unequally.

NOW THIS DEED WITNESSETH that in exercise of the power in that behalf conferred on him by the said Settlement and of all other powers the said A hereby irrevocably appoints that the investments and property which now are or may hereafter by any means become subject to the trusts of the said Settlement [including the sum of £—— advanced to the said B] shall (subject to the life interest of him the said A and the power of varying investments contained in the said Settlement) be held by the trustees for the time being thereof IN TRUST for C, D and E (the three children of the said A and B) in the following shares that is to say As to one moiety thereof for the said C absolutely As to one equal fourth part thereof for the said D absolutely and As to the remaining equal fourth part thereof for the said E absolutely.

IN WITNESS *etc.*

VI

Release by Father of Power of Appointment under Voluntary Settlement among Children so as to Vest the Funds in them Equally.

THIS RELEASE made by the within named A WITNESSETH that the said A hereby releases the investments and property now or which may hereafter become subject to the trusts of the within written Settlement from the power of appointment in favour of her issue thereby conferred (which she has not exercised) to the intent that the same property may be held on the trusts thereby declared in default of appointment.

IN WITNESS *etc.*

VII

Appointment by Husband and Wife under Power in their Marriage Settlement of the Whole Fund to the Children in Equal Shares, with Accruer Clause Providing for Death under Twenty-one, or Power of Revocation (*i*).

Appoint to children equally.

THIS APPOINTMENT made by us A of *etc.* and B his wife WITNESSETH that in exercise of the power in that behalf conferred on

(*h*) See Note (*a*) to Precedent 1. It is assumed that the children are all of age; if not, a power of revocation or accruer clause would be desirable to provide for the possible death of a child under twenty-one.

(*i*) See Note (*a*) to Precedent 1. The statutory power of maintenance will apply without express incorporation. If the settlement was made after 1925 the statutory power of advancement will also apply. Otherwise a power of advancement may be desirable

us by a Settlement dated *etc.* and made between *etc.* (being a Settlement made in consideration of our marriage) and of all other powers We hereby irrevocably appoint that from and after the death of the survivor of us and in the meantime subject to our life interests therein all and singular the investments and property which are now or may hereafter become subject to the trusts of the said Settlement shall be held by the trustees for the time being thereof upon the trusts following that is to say IN TRUST for all or any our children or child who being male attain the age of 21 years or being female attain that age or marry under that age and if more than one in equal shares [Provided that if any of our children being male shall die under the age of 21 years or being female shall die under that age without having been married then as well the original share of such child as every additional share which may accrue or be added thereto under this present proviso shall go and accrue by way of addition to the shares of our other children if more than one in equal shares] [Provided always that we may during our joint lives or the survivor of us may by deed revocable or irrevocable revoke in whole or in part the appointment hereby made and may in like manner make any other appointment relating to the premises which may be authorised by the said power of appointment in the said Settlement] (*k*).

Accruer clause.

Power of revocation.

IN WITNESS *etc.*

VIII

Release by Husband and Wife of Power of Revocation Reserved by Appointment.

THIS RELEASE made by the within named A and B his wife WITNESSETH that the said A and B in exercise of all powers enabling them in that behalf hereby release the power of revocation in the within written Appointment to the intent that the appointment therein contained in favour of their children shall forthwith become and remain indefeasible.

IN WITNESS *etc.*

IX

Appointment by Mother under Power in a Will of a Sum of Stock Equally between her Children, one of whom is an Infant, and Surrender of her Life Interest, the Trustees being given a Release.

THIS APPOINTMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Appointor") of the one part B of *etc.* of the second part C of *etc.* of the third part D of *etc.* of the fourth part and E of *etc.* and F of *etc.* (hereinafter called "the Trustees") of the fifth part.

Parties.

WHEREAS :—

(1) X late of —— in the County of —— (hereinafter called "the Testator") by his will dated *etc.* after appointing the Trustees to be

Recitals; will of testator;

if the power is wide enough to authorise it: see *Re Mewburn's Settlement*, [1934] Ch. 112. But where, as here, the share is not taken out of the settlement an express power of advancement (if any) in the settlement would apply. The power of revocation should only be inserted when the accruer clause is not used.

(*k*) For a form of release of this power, see next Precedent. It is assumed of course in that Precedent that the accruer clause was omitted.

the executors and trustees thereof gave to his trustees a legacy of £—— free of duty upon trust to pay the income thereof to the Appointor during her life and after her death in trust for the children or remoter issue of the Appointor or some or one of them in such shares and manner as she should by deed revocable or irrevocable appoint and in default of and subject to any such appointment in trust for the children of the Appointor as therein mentioned but so that no child who or whose issue took any part of the said legacy under any appointment should in the absence of a contrary intention expressed in such appointment be entitled to any share in the unappointed part without bringing such appointed part into hotchpot and accounting for the same And the Testator thereby directed that his Trustees should appropriate investments of a nature authorised by his said will in satisfaction of the said legacy which appropriation should be binding upon all persons interested therein

death and probate;

(2) The Testator died on the —— day of —— 19— without having revoked or altered his said will which on the —— day of —— 19— was duly proved by the Trustees in the —— Probate Registry

appropriation of legacy;

(3) Shortly after the death of the Testator the Trustees appropriated the sum of £—— 3 per cent. Treasury Stock to answer the said legacy

sale of stock and purchase of shares;

(4) In the year 19— the Trustees sold the said sum of £— Treasury Stock and invested the net proceeds in the purchase of —— ordinary shares in —— Ltd. such investment being [authorised] [unauthorised by the said will]

children of marriage;

(5) The Appointor has had issue three children and no more *viz.* the said B and C who are of full age and the said D who is an infant

desire to appoint and surrender life interest;

(6) The Appointor is desirous of making such appointment and surrender in favour of the said B, C and D as is hereinafter contained

agreement for release.

(7) It has been agreed that the Trustees should be given such release as is hereinafter contained and the name of the said D has been inserted as a party hereto to the intent that he may if he thinks fit execute the same on attaining his majority but his failure so to do shall not prevent these presents being binding upon the other parties hereto.

Now this Deed witnesseth as follows:—

Appointment of shares to children.

1. The Appointor in exercise of the power in that behalf conferred on her by the said will of the Testator and of all other powers hereby irrevocably appoints that —— ordinary shares in —— Ltd. (part of the said holding of —— ordinary shares in the same company) shall be held free of all duties which may become payable in respect thereof on the death of the Appointor and the costs of the transfers hereinafter directed to be made (which duties and costs shall be paid out of the residue of the trust funds for the time being subject to the trusts of the Settlement) in trust as to —— such shares for the said B absolutely as to —— such shares for the said C absolutely and as to —— such shares (residue thereof) for the said D if and when he attains the age of 21 years but if he shall die under that age the same shares shall be held in trust for the said B and C in equal shares absolutely (*l*) [And further appoints and declares that for the purpose

(*l*) As to maintenance and advancement see note (*i*) to Precedent VII.

of the said hotchpot provision in the said will of the Testator the value of the said ordinary shares in —— Ltd. hereby appointed shall be deemed to be £—— per share].

Surrender of life interest.

2. The Appointor hereby surrenders and assigns unto the said B, C and D ALL THAT her life interest under the said will in the said —— shares hereinbefore appointed to them TO HOLD the same unto the said B, C and D in equal shares To the end and intent that the same shall forthwith merge in their respective reversionary interests in the same —— shares.

Direction to transfer other shares and retain infant's share.

3. (1) The Appointor in exercise of the aforesaid powers hereby appoints and directs that the Trustees shall retain the said —— shares appointed in favour of the said D subject to the powers and provisions conferred on them by the Settlement or by law until he attains the age of twenty-one years or dies under that age And the Appointor and the said B and C hereby direct that the Trustees shall so soon as may be transfer to the said B and C the said shares hereinbefore appointed to them respectively.

Release to trustees.

4. The said B, C and D and the Appointor according to their respective interests hereby release the Trustees and each of them and their respective executors and administrators from all actions proceedings claims and demands in respect of the purchase of the said ordinary shares in —— Ltd. hereinbefore appointed or otherwise in relation thereto.

IN WITNESS *etc.*

X

Revocation by Mother of Appointment of Aliquot Share to her Daughter and Appointment of a Sum of Cash on her Marriage, and Release of her Life Interest.

THIS DEED OF REVOCATION AND APPOINTMENT is made by A of *etc.* (hereinafter called " the Appointor ")

WHEREAS :—

Recitals: Settlement;

(1) By a Settlement (hereinafter called " the Settlement ") dated *etc.* and made *etc.* certain investments were settled upon trust for payment of the income thereof to the Appointor during her life and after her death for the children or remoter issue of the Appointor by any marriage or some or one of them in such shares and manner as the Appointor should by any deed or deeds revocable or irrevocable appoint and in default of and subject to such appointment for the children of the Appointor by any marriage as therein mentioned with the usual hotchpot provision

revocable appointment;

(2) By an Appointment (hereinafter called " the Appointment ") dated *etc.* and made by the Appointor the Appointor appointed that one equal fourth share of the funds then or which might by any means become subject to the Settlement should subject to her life interest be held in trust for B (one of the four children of the Appointor by her husband C and hereinafter called " the Daughter ") absolutely and thereby reserved a power by deed revocable or irrevocable to revoke the appointment thereby made and to make any other appointment authorised by the settlement

intended marriage of daughter;

(3) A marriage has been arranged and is intended shortly to be solemnised between the Daughter and D

desire to revoke and appoint fixed sum.

(4) The Appointor is desirous of revoking the appointment of a one-fourth share of the funds subject to the Settlement made in favour of the Daughter by the Appointment and of irrevocably appointing that a sum of £—— cash shall in lieu thereof be raised for the benefit of the Daughter and for the purpose of enabling such sum to be raised immediately upon the solemnisation of the said intended marriage of surrendering her life interest therein.

NOW THIS DEED WITNESSETH as follows:—

Revocation of former appointment.

1. In exercise of the power in that behalf reserved to her by the Appointment and of all other powers the Appointor hereby revokes the appointment of a one-fourth part of the funds at any time subject to the trusts of the Settlement made by the Appointment in favour of the Daughter.

Appointment of fixed sum to daughter.

2. In exercise of the power in that behalf conferred upon her by the Settlement and of all other powers the Appointor hereby irrevocably appoints that the net sum of £—— shall immediately upon the solemnisation of the said intended marriage of the Daughter with the said D be raised out of the trust funds subject to the trusts of the Settlement free of all deductions for the costs of raising the same and of all duties which may become payable in respect thereof on the death of the Appointor (which duties and costs shall be paid out of the residue of the said trust funds) and shall be held in trust for the Daughter absolutely.

Surrender of life interest.

3. For the purpose of enabling the said sum of £—— to be raised and paid to the Daughter immediately upon solemnisation of the said intended marriage the Appointor hereby surrenders and assigns unto the Daughter ALL THAT the life interest of the Appointor under the Settlement in the said sum of £—— to the end and intent that the same may forthwith merge in the reversionary interest in the same sum.

Avoidance if marriage not solemnised.

4. If the said intended marriage between the Daughter and the said D shall not be solemnised within six months from the date hereof the revocation new appointment and surrender hereby made and everything herein contained shall be wholly void and of no effect.

IN WITNESS *etc.*

XI

Release to Retiring Trustees on a Division of the Residuary Estate between the Tenant for Life and Remaindermen, the Tenant for Life having released a Power of Appointment among her Issue and the Remaindermen having been appointed Trustees (*m*).

Parties.

THIS RELEASE is made the —— day of —— 19— BETWEEN A of *etc.* widow (hereinafter called "the Mother") of the first part B of *etc.* (hereinafter called "the Son") of the second part C of *etc.*

(*m*) The object of the arrangement carried out by this Precedent is, of course, to save *ad valorem* stamp duty on the partial release of the life interest. The succession duty can be commuted; the trustees of the will would be liable for estate duty (if any) payable on the funds transferred to the life tenant and remaindermen respectively in the event of the mother's death within five years, and it is to avoid the necessity of retaining funds to protect them from liability that the remaindermen are appointed new trustees as part of the scheme.

[*Continued in next Part*]

(hereinafter called " the Daughter ") of the third part and D of *etc.* and E of *etc.* (hereinafter called " the Trustees ") of the fourth part.

WHEREAS :—

Recitals; will of testator;

(1) X late of —— in the county of —— (hereinafter called " the Testator ") by his will dated the —— day of —— 19— after appointing the Trustees to be the executors and trustees thereof and bequeathing certain pecuniary legacies devised and bequeathed all his real estate and the residue of his personal estate to his trustees upon trust to sell and convert the same as therein mentioned and to invest the net proceeds of sale after payment of his funeral and testamentary expenses and debts and the legacies given thereby or by any codicil thereto and to hold the said proceeds of sale and conversion and the investments from time to time representing the same upon trust to pay the income thereof to his daughter the Mother during her life and after her death in trust as well as to income as capital in trust for her children or remoter issue or some or one of them in such shares and manner as the Mother should by deed revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment in trust for all or any her children or child who being male attained the age of twenty-one years or being female attained that age or married under that age and if more than one in equal shares

death and probate;

(2) The Testator died on the —— day of —— 19— without having revoked or altered his said will which was on the —— day of —— 19— duly proved by the Trustees as the executors therein named in the —— Probate Registry

number of children;

(3) The Mother had issue two children and no more *viz.* the Son and the Daughter both of whom have attained the age of twenty-one years

administration of estate;

(4) Shortly after the death of the Testator the Trustees paid the funeral and testamentary expenses and debts of the Testator and the duties payable on his death and paid the pecuniary legacies bequeathed by his will and the net residuary estate of the Testator remaining after the payments aforesaid was at the date of the agreement hereinafter mentioned represented by the investments specified in the several parts of the Schedule hereto

appointment of children in place of trustees;

(5) By an Appointment dated *etc.* and made between *etc.* the Son and the Daughter were appointed trustees of the said will of the Testator in the place of the Trustees who thereby retired from the trusts thereof and the said investments were transferred into the joint names of the Son and the Daughter

release of power of appointment;

(6) By a Release dated *etc.* the Mother released her recited power of appointment among her issue to the intent that the Son and the Daughter should become absolutely entitled to the said proceeds of sale of the Testator's said residuary estate

agreement to divide funds;

(7) Prior to the payment next hereinafter recited it was agreed between the Mother the Son and the Daughter that they should put an end to the trusts declared by the said will in relation to the said proceeds of sale and conversion of the Testator's residuary estate and that the investments specified in the First Part of the said Schedule hereto should (subject to the payment of the succession duty payable on her death in respect of the entirety of the said residuary estate) belong to

the Mother for her absolute use and benefit and the investments specified in the Second and Third Parts of the same Schedule should belong to the Son and Daughter respectively for their absolute use and benefit

payment of succession duty;

(8) Pursuant to the said agreement the Son and the Daughter commuted the succession duty payable on the Mother's death in respect of the said proceeds of sale of the residuary estate of the Testator and sold so much of the investment firstly specified in the said First Part of the said Schedule as was necessary to provide for such succession duty and paid the same out of the net proceeds of sale thereof accordingly

transfer of investments;

(9) The Son and the Daughter have sold the residue of the said investments specified in the First Part of the said Schedule and have paid the net proceeds of such sale to the Mother and have sold the said investments specified in the Second and Third Parts thereof and have paid the net proceeds of such sales to them the Son and the Daughter respectively

agreement for release.

(10) It was agreed upon the retirement of the Trustees as aforesaid that they should be given such release as is hereinafter contained.

NOW THIS DEED WITNESSETH and it is hereby agreed and declared as follows :—

Release to retiring trustees.

1. In pursuance of the said agreement the Mother the Son and the Daughter according to their respective original and derivative interests in the residuary estate of the Testator hereby release the Trustees and each of them and their respective personal representatives from all actions proceedings claims and demands in respect of the said investments specified in the several parts of the said Schedule and the sale and payment thereof as aforesaid or other the residuary estate of the Testator and in respect of any sale investment transposition of investment payment or other dealing or anything done or omitted by the Trustees or either of them in the administration of the estate of the Testator or the execution of the trusts of his residuary estate or otherwise relating to the premises.

Agreement as to incidence of estate duty.

2. The Mother the Son and the Daughter hereby agree and declare that any estate or other duties which may become payable on their respective deaths in respect of the said monies so paid to them as aforesaid shall be paid and discharged by the personal representatives of the party to whom such monies have been so paid out of his or her estate.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

Part I

Investments to belong to the Mother (subject to payment of succession duty).

Part II

Investments to belong to the Son.

Part III

Investments to belong to the Daughter.

XII

Appointment by a Wife of a Life Interest to Her Husband under a Power in a Voluntary Settlement (*n*).

THIS DEED OF APPOINTMENT is made by A the wife of B of *etc.* (hereinafter called "the Appointor")

WHEREAS:—

Recitals; voluntary settlement;

(1) These presents are supplemental to a Settlement (hereinafter called "the Settlement") dated *etc.* and made *etc.* whereby certain investments were settled upon trust to pay the income thereof to the Appointor during her life and after her death upon the trusts and with and subject to the powers and provisions therein declared and contained including a power for the Appointor by deed revocable or irrevocable to appoint that from and after her death the income of one moiety or any lesser part of the trust funds be paid to any husband who might survive her for his life or any lesser period and subject to such conditions as she might think fit

desire to appoint life interest to husband.

(2) The Appointor is desirous of exercising the said power in favour of her said husband B.

NOW THIS DEED WITNESSETH that in exercise of the power in that behalf conferred on her by the Settlement and of all other powers the Appointor hereby [irrevocably] appoints that from and after her death the income of one moiety of the trust funds and property for the time being subject to the trusts of the Settlement shall be paid to her said husband or his assigns if he shall survive her during the residue of his life [PROVIDED always that the Appointor may by deed revoke in whole or in part the appointment hereby made].

Appointment of life interest to husband.

Power of revocation.

IN WITNESS *etc.*

Form 20

Transfer for Value, by Trustees to Trustees, of Legal Charge of Freeholds, Borrower Joining and Entering into Covenants Under the Town and Country Planning Act, 1947, the Rate of Interest being Increased, One of the Original Chargees Having Died, and there having been a Subsequent Transfer and a Further Charge. Variations where Surety Joins (*a*).

(*Drafted by Dennis B. Pugh, of the Inner Temple, Barrister-at-Law*)

A TRANSFER OF LEGAL CHARGE made *etc.* BETWEEN A of *etc.* B of *etc.* and C of *etc.* (hereinafter called "the Transferors") of the first part Q of *etc.* (hereinafter called "the Borrower" which expression shall where the context so admits or requires include the estate owner

Parties.

(*n*) See Note (*a*) to Precedent 1.

(*a*) Stamp *ad valorem* on amount transferred. This precedent is intended for use where the original charge having been entered into before the coming into force of the T. & C. P. Act, 1947, the intending transferees wish to be protected against the provisions of such Act, while avoiding the additional stamp duty attracted by a fresh mortgage. If the draughtsman considers that the "authorised use" under the Act should be a matter of title (see pp. 36 to 49, *supra*), he may also incorporate in the deed such additional clauses as may be appropriate from pp. 501 to 505, *supra*. As to the effect of the deed, see s. 114 of the Law of Property Act, 1925.

or estate owners for the time being of the property charged) of the second part [S of *etc.* (hereinafter called "the Surety") of the third part] and X of *etc.* Y of *etc.* and Z of *etc.* (hereinafter called "the Transferees" which expression shall where the context so admits or requires include the survivors or survivor of them the personal representatives of such survivor and their or his assigns) of the third [fourth] part.

Recitals:

WHEREAS:—

legal charge;

(1) By a Legal Charge (hereinafter called "the Legal Charge") dated *etc.* and made between the Borrower of the one part and P and the said A and B of the other part the freehold property shortly described in the Schedule hereto was charged by the Borrower expressly by way of legal mortgage with the payment to the said P A and B on the day therein mentioned and since passed of the sum of £—— advanced to the Borrower by them out of money belonging to them on a joint account with interest thereon at the rate of £ (*original rate*) per centum per annum

death of one of the original chargees;

(2) The said P died on ——

transfer;

(3) By a transfer dated *etc.* and made between the said A and B of the one part and the Transferors of the other part the benefit of the Legal Charge was conveyed and transferred to the Transferors

further charge;

(4) By a Further Charge (hereinafter called "the Further Charge") dated *etc.* and made between the Borrower of the one part and the Transferors of the other part the Borrower declared that all the property comprised in the Legal Charge should thenceforth be a security for and be charged with the further sum of £—— then advanced to the Borrower by the Transferors out of money belonging to them on a joint account with interest thereon at the rate aforesaid in addition to the said sum of £——

state of debt;

(5) The said respective sums of £—— and £—— (making together the aggregate sum of £——) remain owing to the Transferors on the security of the Legal Charge and the Further Charge as testified by the execution of these presents by the Borrower but all interest for the same has been paid up to the date of this deed as the Transferors hereby admit

agreement for transfer;

(6) The Transferees have at the request of the Borrower agreed to pay to the Transferors the said aggregate sum of £—— out of moneys belonging to them on a joint account upon having such transfer of the said aggregate mortgage debt of £—— and interest and the securities for the same as is hereinafter contained

agreement by borrower to join;

(7) The Borrower has agreed to join in these presents for the purpose of entering into such further covenants as are hereinafter expressed

agreement by surety to join.

[(8) The Surety has also agreed to join in these presents as surety for the Borrower in manner hereinafter appearing.]

NOW THIS DEED WITNESSETH and it is HEREBY AGREED AND DECLARED as follows:—

Consideration.

1. This Deed is made in pursuance of the said agreements and in consideration of the sum of £—— now paid to the Transferors by the Transferees out of money belonging to them on a joint account being the amount of the aggregate principal sum owing in respect of the

Legal Charge and Further Charge (the receipt of which sum they the Transferors hereby acknowledge).

Transfer.

2. The Transferors as mortgagees hereby convey and transfer unto the Transferees the benefit of the Legal Charge and of the Further Charge.

Covenant by Borrower [*and Surety*] to pay debt and interest

3. The Borrower [and the Surety] hereby [jointly and severally] covenant(s) with the Transferees to pay to the Transferees the said aggregate mortgage debt of £—— in accordance with the respective covenants on the part of the Borrower in the Legal Charge and Further Charge contained AND FURTHER to pay to the Transferees as from the date hereof interest thereon or on the principal moneys for the time being remaining secured by the Legal Charge and Further Charge or on any order or judgment which may be made or recovered thereunder at the rate of £ (*increased rate*) per centum per annum at the times and in the manner as are in the Legal Charge and Further Charge mentioned PROVIDED ALWAYS and it is hereby agreed that if the Borrower shall on any day on which interest is by the Legal Charge and Further Charge made payable or within 14 days thereafter pay to the Transferees interest on the principal moneys for the time being remaining due on the security thereof at the rate of £ (*reduced rate*) per centum per annum and if the power of sale applicable thereto shall not have become exercisable then the Transferees will accept interest at such reduced rate for the quarter of a [half] year for which such interest shall be paid to them within such 14 days as aforesaid.

Proviso for reduction of rate of interest on punctual payment.

Covenants by Borrower [*and Surety*]:

4. The Borrower [and the Surety] hereby [jointly and severally] FURTHER COVENANT(S) with the Transferees and it is hereby AGREED AND DECLARED as follows:—

definitions;

(i) In this Deed where the context so admits or requires the expression "the said Act" shall mean and include the Town and Country Planning Act 1947 and any Act for the time being amending or re-enacting the same and any Statutory Instrument made thereunder and the expression "the said property" shall mean and include the property charged by the Legal Charge and Further Charge

not to carry out development without consent;

(ii) The Borrower will not at any time during the continuance of the security constituted by the Legal Charge and Further Charge without the previous consent in writing of the Transferees carry out or make or suffer to be carried out or made any development within the meaning of the said Act in on or over or in respect of the said property or any part thereof

to apply for planning permission and pay development charge;

not to commence development until permission obtained and development charge paid, and to comply with conditions;

(iii) If the Transferees shall consent in writing as aforesaid the Borrower will at his own expense duly apply to the Local Planning Authority as defined by the said Act for any necessary permission to carry out or make such development as aforesaid and will duly pay or give proper security for the payment of any development charge leviable in respect thereof and will not commence to carry out or make or suffer to be commenced to be carried out or made such development until he shall have produced to the Transferees such permission and also a certificate from the Central Land Board that such development charge has been paid or secured in accordance with the provisions of the said Act and in carrying out or making or suffering to be carried out or made such development he will duly comply with or cause to

be duly complied with any conditions subject to which such permission shall have been granted

not to contravene the Act;

(iv) The Borrower will not do or omit or suffer to be done or omitted any act matter or thing in over or in respect of the said property or any part thereof required to be omitted or done by or which shall in any way contravene the provisions of the said Act or the conditions subject to which any development permission may be granted as aforesaid and will duly pay all charges imposed and all costs and expenses incurred as a result of the doing or omitting of such act matter or thing

give particulars of notices or orders made under the Act, and to comply therewith;

(v) The Borrower will within seven days of the receipt thereof by him give full particulars to the Transferees of any notice or order or proposal for a notice or order affecting the said property or any part thereof given issued or made by a planning authority under or by virtue of the said Act and if so required by the Transferees will produce such notice order or proposal to them and also will without delay take all reasonable or necessary steps to comply with such notice or order or proposal for the same AND ALSO will at the request of the Transferees make or join with the Transferees in making such objections representations or appeals against or in respect of the same as the Transferees may deem expedient

join in appeals, etc.;

indemnify against costs, etc., in respect of Act;

(vi) The Borrower will at all times indemnify and keep indemnified the Transferees from and against all costs charges expenses claims and demands whatsoever incurred or paid by the Transferees in respect of such application objection representation appeal or act matter or thing contravening the provisions of the said Act or the conditions as aforesaid or otherwise by virtue of or in connection with any matter or thing arising under or by virtue of the said Act AND all such costs charges and expenses whether or not occasioned by any act neglect or default on the part of the Borrower shall be deemed to be costs charges and expenses properly incurred by the Transferees within the meaning of clause —— (*b*) of the Legal Charge

charge of costs, etc., under Act;

further events in which debt may be called in;

requisitioning;

designation for compulsory acquisition under development plan;

order under s. 26.

(vii) In any one or more of the following events namely :—

(a) If any order for the compulsory acquisition of the said property or any part thereof by any competent authority shall be made and confirmed.

(b) If the said property or any part thereof shall be designated as subject to compulsory acquisition under and by virtue of any development plan prepared under the said Act.

(c) If any order shall be made and confirmed under the said Act requiring the discontinuance of any user or the alteration or removal of any buildings or works of or on the said property or any part thereof (*c*) the principal moneys for the time being secured by the Legal Charge and Further Charge shall be deemed to have been called in and unpaid for three months on the date on which such order was confirmed or development plan approved as the case may be and all the Transferees' powers for the realisation and protection of the security created by the Legal Charge and Further Charge shall become exercisable on such date as aforesaid.

(*b*) The clause referred to will be the one usually inserted in mortgages charging the mortgagees' expenses with interest.

(*c*) See s. 26 of the Act.

[*Add any other usual mortgage provisions, such as covenants against registration, protection of Transferees against mere registration giving notice of subsequent incumbrances, and as to handing over deeds on discharge, as may have been omitted from the original charge.*]

Surety clauses.

5. [As between the Borrower and the said property on the one hand and the Surety on the other hand the Borrower and the said property shall be primarily liable for the payment of the said principal and interest but this provision shall not affect the Transferees nor in any way preclude them from enforcing or having recourse to all or any remedies or means for recovering payment thereof which may be available under this deed or otherwise at such times and in such manner as they shall think fit.]

6. [Although as between the Surety and the Borrower the Surety is only surety for the Borrower yet as between the Surety and the Transferees the Surety shall be considered as a principal debtor for all the principal moneys and interest for the time being hereby secured so that the Surety shall not be released by time being given to the Borrower or by any other variation in the provisions of this deed or of the Legal Charge and Further Charge or any other act omission matter or thing whatsoever whereby the Surety as a surety only would have been so released.]

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

(*Short description of the property charged.*)

Form 21

Assent by Administrator in Favour of Himself with Consent of the Next-of-kin, to give effect to an Informal Gift to Him by the Intestate (*a*).

Parties.

THIS DEED OF FAMILY ARRANGEMENT AND ASSENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Administrator") of the first part B of *etc.* of the second part and C of *etc.* of the third part.

Recitals: informal gift;

WHEREAS:—

(1) By a document dated *etc.* but not executed and attested as required by the Wills Act 1837 X late of —— in the County of —— declared that it was his wish that after his death his house No. —— Street in the County of London should be handed over to the Administrator

death of intestate and letters of administration;

(2) The said X (hereinafter called "the Intestate") died intestate on the —— day of —— 19— and on the —— day of —— 19— letters of administration to his estate were granted out of the —— Probate Registry to the Administrator

(*a*) Notice of the assent should be endorsed on the probate. The stamp on the assent will be *ad valorem* and require adjudication. An ordinary assent by the administrator in his own favour so stamped would raise questions as to whether the assent was to effect a purchase by the administrator from himself. It is suggested therefore that in a simple case it is better to bring the beneficial interests on the title, as in the above Precedent. Alternatively, a separate deed of family arrangement could be made which would bear the *ad valorem* stamp duty.

seisin of house;

(3) The Intestate was at his death seised in fee simple in possession free from incumbrances of the said house and premises hereinafter described

next-of-kin;

(4) The Administrator and the said B and C were the sole next-of-kin of the Intestate entitled to share in his estate

desire to give effect to gift.

(5) The said B and C are desirous that the wishes of the Intestate so expressed as aforesaid shall be carried out and have agreed with the Administrator that he should assent to the vesting of the said premises in himself beneficially.

Assent.

Now for effecting the wishes of the Intestate and in pursuance of the said agreement the Administrator as PERSONAL REPRESENTATIVE of the Intestate at the request and with the consent hereby testified of the said B and C hereby assents to the vesting in himself of ALL THAT messuage or tenement with the garden and appurtenances known as No. —— Street in the County of London TO HOLD the same for all the estate and interest of the Intestate at his death.

AS WITNESS *etc.*

Form 22

Vesting Instruments where the Estates have been Resettled or the Life Estate Surrendered.

I

Vesting Assent by Personal Representatives of a Deceased Tenant for Life where the Property has been Resettled but Family Charges under the Old Settlement Subsist (*a*).

Parties.

THIS VESTING ASSENT is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called " the Grantors ") of the one part and C of *etc.* (hereinafter called " the Present Tenant for Life ") of the other part.

Recitals:

WHEREAS:—

vesting deed;

(1) By a principal vesting deed (hereinafter called " the Vesting Deed ") dated *etc.* and made between E and F of the one part and C (hereinafter called " the late Tenant for Life ") of the other part it was declared that the freehold premises therein described (hereinafter called " the Settled Land ") were vested in the late Tenant for Life in fee simple upon the trusts and with and subject to the powers and provisions declared and contained concerning the same in the will of H (hereinafter called " the Testator ") who died on the —— day of —— 19— and whose will was proved by the said E and F in the —— Probate Registry on the —— day of —— 19— and that the said E and F were the trustees for the purposes of the Settled Land Act 1925 of the settlement created by the said will of the Testator in relation to the Settled Land

death of first life tenant and probate;

(2) The late Tenant for Life died on the —— day of —— 19— and on the —— day of —— 19— probate of his will dated the —— day

(*a*) This Precedent will apply both when the property has been disentailed and resettled subject to family charges which still subsist and when the remainderman has settled his reversion. See *Re Craddock's S. E.*, [1926] Ch. 944. When the original settlement came to an end on the death of the tenant for life the next Precedent should be used. Notice of the assent should be endorsed on the probate.

of —— 19— was on the —— day of —— 19— granted out of the Principal Probate Registry to the Grantors as the then trustees of the settlement limited to the Settled Land

(3) The Settled Land is now the subject of a compound settlement (hereinafter called " the Compound Settlement ") consisting of the said will of the Testator and a resettlement dated *etc.* and made between *etc.* compound settlement;

(4) The Grantors are the trustees of the Compound Settlement for the purposes of the Settled Land Act 1925 grantors trustees of settlement;

(5) The present Tenant for Life has requested the Grantors to execute such Vesting Assent as is hereinafter contained. request for vesting assent.

NOW IT IS HEREBY DECLARED AS FOLLOWS :—

1. The Grantors as PERSONAL REPRESENTATIVES of the late Tenant for Life hereby assent to the vesting in the present Tenant for Life of ALL AND SINGULAR the premises [described or referred to by general description in the Vesting Deed] [described in the Schedule hereto] for an estate in fee simple [subject as to the parts affected thereby to a mortgage dated *etc.* and made between *etc.*]. Assent.

2. The premises are vested in the present Tenant for Life upon the trusts declared concerning the same by the Compound Settlement or upon such other trusts as the same ought to be held on from time to time. Declaration of trust.

3. The Grantors are the trustees of the Compound Settlement for the purposes of the Settled Land Act 1925. Trustees of settlement.

4. The following additional or larger powers are conferred by the Compound Settlement and by virtue of the Settled Land Act 1925 operate and are exercisable as if conferred by that Act on a tenant for life *viz.* —— [set out the powers]. Additional powers.

5. The power of appointing a new trustee or new trustees of the Compound Settlement is vested in [the present Tenant for Life] during his life. Power to appoint new trustees.

6. The Grantors hereby declare that they have not as personal representatives of the late Tenant for Life made or executed any previous assent or conveyance in respect of the legal estate in the property the subject of this Vesting Assent or any part thereof. Declaration of no previous assent

7. The Grantors hereby acknowledge the right of the present Tenant for Life to production of the probate of the said will of the late Tenant for Life so granted to them as aforesaid possession whereof is retained by them and to delivery of copies thereof. Acknowledgment for production of probate.

AS WITNESS

[*Add Schedule containing a description of the property if required.*]

II

Vesting Assent by Personal Representatives of a Deceased Tenant for Life where the Estates have been Resettled and the Original Settlement has come to an end (*a*).

Parties. THIS VESTING ASSENT is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Grantors") of the one part and C of *etc.* (hereinafter called "the present Tenant for Life") of the other part.

Recitals: Whereas:—

vesting assent; (1) By a Vesting Assent dated *etc.* and signed by the Grantors as the personal representatives of C (hereinafter called "The Testator") (who died on the —— day of —— 19— and probate of whose will dated the —— day of —— 19— was granted to the Grantors by the —— Probate Registry on the —— day of —— 19—) the —— settled estates of which the Testator was estate owner at his death were vested in H (hereinafter called "the late Tenant for Life") upon the trusts declared concerning the same by the said will And it was by the Vesting Assent now in recital declared that the Grantors were the trustees for the purposes of the Settled Land Act 1925 of the settlement created by the said will in relation to the said settled estates

death of first tenant for life; (2) The late Tenant for Life died on the —— day of —— 19— and on the —— day of —— 19— probate of his last will dated the —— day of —— 19— was granted by the —— Probate Registry to the Grantors limited to the aforesaid settled estates

determination of old settlement; (3) All limitations powers and charges under the settlement created by the said will of the Testator in relation to the said settled estates have ceased and determined

tenant for life under resettlement; (4) The present Tenant for Life is tenant for life in possession of the property hereinafter described (being the portions of the said settled estates now remaining unsold or undisposed of) under and by virtue of a Resettlement (hereinafter called "the Subsisting Settlement") dated *etc.* and made *etc.*

trustees of resettlement; (5) The Grantors are the trustees for the purposes of the Settled Land Act 1925 of the Subsisting Settlement (*b*)

deed of discharge; (6) It is intended that by a deed bearing even date with but executed after these presents and made between the Grantors of the one part and the present Tenant for Life of the other part the Grantors shall discharge themselves from the trusts of the settlement created by the said will of the Testator

request for assent. (7) The present Tenant for Life has requested the Grantors to make such Vesting Assent as is hereinafter contained.

NOW IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:—

Assent. 1. The Grantors as PERSONAL REPRESENTATIVES of the late Tenant for Life hereby assent to the vesting in the present Tenant for Life of

(*a*) It is assumed that all trusts and family charges under the original settlement have determined; also that the resettlement was either subject to the late tenant for life's life estate under the will or that such life estate was restored. Notice of the assent should be endorsed on the probate.

(*b*) It is assumed that the trustees of the old settlement are to act also as trustees of the resettlement. As to the special grant of probate in such a case, see *Re Taylor, deceased*, 45 T. L. R. 481.

ALL AND SINGULAR the lands and property described in the First and Second Schedules hereto as to the freehold and enfranchised property described in the said First Schedule in fee simple subject as to the parts affected thereby to the legal mortgages mentioned in the Second Part of the same Schedule and to the subsisting rights of the lord of the manor and as to the leasehold property described in the said Second Schedule for all the residue of the terms of years for which the several parts thereof are respectively held subject to the payment of the rents reserved by and to the performance and observance of the covenants on the part of the lessee and the conditions by and in such leases respectively reserved and contained (*c*).

Declaration of trust.

2. The premises are vested in the present Tenant for Life upon the trusts declared concerning the same by the Subsisting Settlement or upon such other trusts as the same ought to be held on from time to time.

Trustees of settlement.

3. The Grantors are the trustees of the Subsisting Settlement for the purposes of the Settled Land Act 1925.

Additional powers.

4. The following additional or larger powers are conferred by the Subsisting Settlement and by virtue of the Settled Land Act 1925 operate and are exercisable as if conferred by that Act on a Tenant for Life *viz.* —— [set out the powers] (*d*).

Power to appoint new trustees.

5. The power of appointing a new trustee or new trustees of the Subsisting Settlement is vested in [the present Tenant for Life] during his life.

Covenant of indemnity.

6. The present Tenant for Life hereby covenants with the Grantors that the present Tenant for Life and the persons deriving title under him will at all times hereafter during his life duly pay all rent due or to become due as from the death of the late Tenant for Life under the respective leases referred to in the said Second Schedule hereto and will as from the said date observe and perform all the covenants agreements and conditions therein contained and on the part of the lessee to be observed and performed during his life and will save harmless and keep indemnified the Grantors and their respective estates and effects and the estate and effects of the late Tenant for Life from and against all proceedings costs claims and expenses on account of any omission to pay the said rents or any of them or any breach of the said covenants agreements and conditions.

7. [*Declaration of no previous assent.*]

8. [*Acknowledgment of right to production of probate.*]

IN WITNESS *etc.*

THE FIRST SCHEDULE ABOVE REFERRED TO.

FIRST PART.

[*This will contain a description of the freehold and enfranchised lands.*]

(*c*) The parcels should not be described by reference to the original Vesting Assent as this is apparently not an "existing vesting instrument" within s. 5 of the Settled Land Act.

(*d*) If the resettlement conferred important new powers there should strictly have been a new vesting deed executed, even if the late tenant for life's life estate under the will was, as is usual, restored.

SECOND PART.

[*This will contain particulars of the legal mortgages.*]

THE SECOND SCHEDULE ABOVE REFERRED TO.

[*This will contain a description of the leaseholds.*]

III

Deed of Discharge to Accompany Last Precedent.

Parties. THIS DEED OF DISCHARGE is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Trustees") of the one part and C of *etc.* (hereinafter called "the Tenant for Life") of the other part.

Recitals: WHEREAS :—

vesting assent; (1) By a Vesting Assent (hereinafter called "the Principal Vesting Assent") dated *etc.* and signed by the Trustees as the personal representatives of G (hereinafter called "the Testator") who died on the —— day of —— 19— and probate of whose will dated the —— day of —— 19— was granted to the Trustees on the —— day of —— 19— by the —— Probate Registry the —— Settled Estates of which the Testator was estate owner at his death were vested in H upon the trusts declared concerning the same by the said will And it was by the Vesting Assent now in recital declared that the Trustees were the trustees for the purposes of the Settled Land Act 1925 of the Settlement (hereinafter called "the Settlement") created by the said will in relation to the said —— Estates

death of first tenant for life; (2) The said H died on the —— day of —— 19— and on the —— day of —— 19— probate of his will dated the —— day of —— 19— was granted by the —— Probate Registry to the Trustees limited to the aforesaid Settled Estates

cesser of settlement; (3) All interests and powers under the Settlement have ceased and determined

trustees of settlement; (4) The Trustees were at the death of the said H the trustees of the Settlement for the purposes of the Settled Land Act 1925

vesting assent; (5) By a Vesting Assent bearing even date with but executed before this Assent and made between the Trustees of the one part and the Tenant for Life of the other part the said —— Estates were vested in the Tenant for Life as tenant for life in possession under and by virtue of a Resettlement dated *etc.* and made *etc.* upon the trusts declared by such Resettlement and it was thereby declared that the Trustees were the trustees of the said Resettlement for the purposes of the Settled Land Act 1925

request for discharge. (6) The Tenant for Life has pursuant to section seventeen of the Settled Land Act 1925 requested the Trustees to execute such discharge as is hereinafter contained.

Discharge of trustees. NOW THIS DEED WITNESSETH that the Trustees hereby declare that they are discharged from the trusts affecting the said —— Estates as described [by reference] in the Principal Vesting Assent under and by

virtue of the Settlement or otherwise and that the said —— Estates are settled land by virtue of the said Vesting Assent dated *etc.* and the said Resettlement dated *etc.* therein referred to.

IN WITNESS *etc.*

IV

Vesting Deed on the Surrender of the Life Estate of the Tenant for Life in Possession to the Tenant for Life in Remainder.

THIS VESTING DEED is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the First Tenant for Life") of the first part B of *etc.* (hereinafter called "the Second Tenant for Life") of the second part and C of *etc.* and D of *etc.* (hereinafter called "the Trustees") of the third part. Parties.

WHEREAS :— Recitals :

(1) By a Vesting Deed (hereinafter called "the Vesting Deed") dated *etc.* and made between E and F of the one part and the First Tenant for Life of the other part it was declared that the premises described in the Schedule hereto were [with other property] vested in the First Tenant for Life as to such as were of freehold tenure in fee simple and as to such as were of leasehold tenure for all the residue of the respective terms of years for which the same were held upon the trusts applicable thereto under and by virtue of a Trust Instrument (hereinafter called "the Trust Instrument") dated *etc.* and made *etc.* And that the said E and F were the trustees of the Settlement for the purposes of the Settled Land Act 1925 vesting deed;

(2) The Trustees are (as stated in the endorsements on the Vesting Deed) the present trustees of the Settlement for the purposes of the Settled Land Act 1925 present trustees of settlement;

(3) The First Tenant for Life has absolutely assured his life estate in the said premises to the Second Tenant for Life with intent to extinguish the same surrender of life estate;

(4) The Second Tenant for Life has requested the First Tenant for Life to convey and assign to him the said premises described in the said Schedule hereto pursuant to section seven of the Settled Land Act 1925. request for conveyance.

NOW THIS DEED WITNESSETH and it is hereby declared as follows :—

1. The First Tenant for Life AS SETTLOR hereby conveys and assigns unto the Second Tenant for Life ALL AND SINGULAR the freehold lands and property described in the first part of the said Schedule hereto and the leasehold property described in the second part of such Schedule TO HOLD unto the Second Tenant for Life as to the freehold property in fee simple and as to the leasehold property for all the residue of the respective terms of years for which the several parts thereof are held subject to the payment of the rents reserved by and the performance and observance of the covenants on the part of the lessee and the conditions in the several leases respectively reserved and contained. Conveyance to tenant for life in remainder.

2. The Second Tenant for Life shall stand possessed of the premises upon the trusts declared concerning the same by the Trust Instrument Declaration of trust.

or upon such other trusts as the same ought to be held on from time to time.

Trustees of settlement.

3. The Trustees are the trustees of the Settlement for the purposes of the Settled Land Act 1925.

Additional powers.

4. The following additional or larger powers are conferred by the Trust Instrument and by virtue of the Settled Land Act 1925 operate and are exercisable as if conferred by that Act on a Tenant for Life *viz.* —— [set out the powers].

Power to appoint new trustees.

5. The power of appointing a new trustee or new trustees of the Settlement is vested in [the First Tenant for Life during his life] (*a*).

AS WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

FIRST PART

[*This will contain a description of the freeholds.*]

SECOND PART

[*This will contain a description of the leaseholds.*]

V

Conveyance of the Legal Estate in Freeholds by a Tenant for Life who has Surrendered his Life Estate to a Remainderman Absolutely Entitled, the Trustees Joining to Discharge Themselves.

Parties.

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Tenant for Life") of the first part B of *etc.* (hereinafter called "the Remainderman") of the second part and C of *etc.* and D of *etc.* (hereinafter called "the Trustees") of the third part.

Recitals: vesting deed;

WHEREAS:—

(1) By a Vesting Deed (hereinafter called "the Vesting Deed") dated *etc.* and made between the Trustees of the one part and the Tenant for Life of the other part it was declared that the freehold property therein described was vested in the Tenant for Life in fee simple upon the trusts applicable thereto under a Trust Instrument (hereinafter called "the Trust Instrument") dated *etc.* and made *etc.* And that the Trustees were the trustees of the Settlement for the purposes of the Settled Land Act 1925

surrender of life estate;

(2) The Tenant for Life has absolutely assured his life estate in the said property to the Remainderman with intent to extinguish the same and the Remainderman is now entitled to the said property free from all limitations powers and charges taking effect under the Trust Instrument (*b*)

(*a*) If the life estate in part only of the property is surrendered, an acknowledgement by the first tenant for life of the second tenant for life's right to production of the deeds may be required, if any relate to both parts of the property. The surrender will operate under s. 105 of the Settled Land Act to pass the Settled Land Act powers to the second tenant for life.

(*b*) A purchaser will be bound under s. 110 (5) of the Settled Land Act, 1925, to assume that the remainderman is entitled free from the limitations of the settlement.

(3) The Remainderman has requested the Tenant for Life to convey to him the said property pursuant to section seven of the Settled Land Act 1925 and has requested the Trustees to join in these presents in manner hereinafter appearing. request for conveyance of legal estate.

NOW THIS DEED WITNESSETH as follows :—

1. The Tenant for Life AS SETTLOR hereby conveys unto the Remainderman ALL AND SINGULAR the property described or referred to by general description in the Vesting Deed TO HOLD unto the Remainderman in fee simple. Conveyance.

2. The Trustees hereby declare pursuant to section seventeen of the Settled Land Act 1925 that they have no notice of any derivative settlement trust for sale or equitable charge affecting the property hereinbefore conveyed or any part thereof and that they are discharged from the trusts affecting the same under the Trust Instrument (*c*). Discharge o trustees.

IN WITNESS *etc.*

Form 23

Second Mortgage by Way of Collateral Security for Further Sum Advanced to the Same Mortgagee on the Security of Other Freehold Property.

THIS MORTGAGE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called " the Borrower ") of the one part and B of *etc.* (hereinafter called " the Mortgagee ") of the other part Parties.

WHEREAS :— Recitals ;

(1) By a legal charge (hereinafter called " the First Mortgage ") dated *etc.* and made between the Borrower of the one part and the Mortgagee of the other part the freehold property hereinafter charged was charged by way of legal mortgage with the payment to the Mortgagee of the principal sum of £x with interest thereon at the rate of £—— per cent. per annum first mortgage ;

(2) By a legal charge (hereinafter called " the Legal Charge ") bearing even date with this mortgage and made between the Borrower of the one part and the Mortgagee of the other part certain other freehold property situate at —— in the County of —— was charged by way of legal mortgage with the payment to the Mortgagee of the principal sum of £y with interest thereon at the rate of £—— per cent. per annum and upon the treaty for the advance of the said principal sum it was agreed that the repayment of the same with interest as aforesaid should be further secured in manner hereinafter appearing legal charge

(3) The said principal sum of £x together with the current interest thereon is still owing on the security of the First Mortgage. state of mort gage debt.

Now in pursuance of the said recited agreement and in consideration of the said sum of £y so advanced by the Mortgagee to the Borrower as aforesaid THIS DEED WITNESSETH as follows :—

1. The Borrower AS BENEFICIAL OWNER hereby charges by way of legal mortgage ALL THAT *etc.* with the payment to the Mortgagee of the principal money interest and other money secured by the Legal Charge subject to the security created by the First Mortgage. Legal charge

(*c*) The discharge of the trustees appears not to be strictly necessary having regard to ss. 17 and 110 (5) of the Settled Land Act, 1925, but it is better to include it.

2. The Mortgagee hereby covenants with the Borrower and it is hereby agreed and declared as follows :—

Covenants to insure and repair (*a*);

(1) The Borrower will during the continuance of this security keep all messuages buildings and property now or for the time being comprised in or subject to this security in good and substantial repair and insured against loss or damage by fire and aircraft [in three-fourths at least of the value thereof] [to the full value thereof] in the —— Insurance Office or in some other Insurance Office or with Underwriters of repute to be approved in writing from time to time by the Mortgagee in the [name or names of the Mortgagee and his assigns] [joint names of the Borrower and the Mortgagee] and will duly and punctually pay all premiums or other money necessary for effecting and keeping up such insurance immediately on the same becoming due or within one week thereafter and will on demand produce to the Mortgagee the policy or policies of such insurance and the receipt for every such payment And that if default shall at any time be made by the Borrower in keeping the said premises or any part thereof in good and substantial repair or in effecting or keeping up such assurance as aforesaid or in producing any such policy or receipt to the Mortgagee on demand the Mortgagee may repair and keep the said premises or any part thereof in repair (with power to enter upon the mortgaged premises for that purpose) or may insure and keep the same insured in any sum not exceeding £—— And that all moneys expended by the Mortgagee under this provision shall be deemed to be properly paid by him Provided always that all repairs made to the mortgaged premises and any insurance against loss or damage by fire effected and maintained in pursuance of the covenants in the First Mortgage shall on production by the Borrower to the Mortgagee of satisfactory evidence as to the state of repair of the mortgaged premises and as to such insurances being in force and the payment of the premium or premiums or other moneys payable in respect thereof be accepted by the Mortgagee in satisfaction or part satisfaction of the covenants to repair and insure hereinbefore contained notwithstanding that the Borrower may be unable to deliver or produce the said policies or the receipts to the Mortgagee

that insurance money may be applied in reduction of debt;

(2) Money received on any insurance of the mortgaged premises whether or not effected in performance of the covenant in that behalf hereinbefore contained shall (subject to the rights of prior mortgagees) be applied either in making good the loss or damage or in discharge of the mortgage debt as the Mortgagee may require

to comply with planning control;

(3) The Borrower will comply with the conditions and provisions of the Town and Country Planning Act 1947 and any other statute statutory instrument rule order or regulation relating to planning control or of any order direction requirement or permission made or granted thereunder and will not carry out any development on the mortgaged premises without the consent in writing of the Mortgagee

against registration.

(4) During the continuance of this security no person shall be registered under the Land Registration Act 1925 or any statutory amendment or re-enactment thereof as proprietor of the mortgaged premises or any part thereof without the consent in writing of the

(*a*) This covenant is desirable even if the borrower has already entered into a similar covenant with the mortgagee in the first mortgage, since the legal charge and collateral security may be transferred to other persons.

Mortgagee and the costs incurred by the Mortgagee in lodging from time to time a caution against registration of the said premises shall be deemed to be costs properly incurred by the Mortgagee under this mortgage.

Power of sale.

3. The statutory power of sale applicable hereto shall become forthwith exercisable without any notice to the Borrower at any time or times after the power of sale applicable to the Legal Charge shall have become exercisable.

Power of consolidation

4. The restriction on the right of consolidation contained in section ninety-three of the Law of Property Act 1925 shall not apply to this security [or to the Legal Charge] (*b*).

Charge of expenses.

5. All costs charges and expenses properly incurred hereunder by the Mortgagee and all moneys properly paid by the Mortgagee shall together with interest thereon at the rate of £—— per cent. per annum be charged on the property for the time being subject to this security and shall on the same being paid be repaid on demand to the Mortgagee by the Borrower with interest thereon from the time of payment at the rate aforesaid and until such demand shall be complied with the Borrower shall pay to the Mortgagee interest at the rate aforesaid on the moneys so paid and for the time being not yet repaid on the respective days appointed for payment of interest on the said principal sum of £y by the Legal Charge PROVIDED that the charge hereby conferred shall be in addition and without prejudice to any and every other remedy lien or security which the Mortgagee may or but for this charge would have for the moneys thereby secured or any part thereof.

Power to sell free from first mortgage.

6. The mortgaged premises or any part thereof may be sold under the statutory power of sale either subject to or discharged from the said principal sum of £x and interest secured by the First Mortgage and upon such terms as to indemnity as the Mortgagee may determine And the Mortgagee may pass and settle the accounts of the person or persons for the time being entitled to such principal sum and interest and all accounts so passed or settled shall be binding on the Borrower.

Definition clause.

7. The expressions "the Borrower" and "the Mortgagee" shall where the context so admits include the estate owner of the fee simple in the mortgaged premises and the persons deriving title under the Mortgagee respectively.

IN WITNESS *etc.*

(*b*) The legal charge would usually contain a clause negativing the statutory restriction on consolidation.

Form 24

Deed Securing an Annuity Pursuant to an Order of the Divorce Court (*a*).

Parties. THIS DEED made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Respondent") of the first part B of *etc.* formerly the wife of the Respondent and now a single woman (hereinafter called "the Petitioner") of the second part and C of *etc.* and D of *etc.* (hereinafter called "the Original Trustees") of the third part

Witnesseth. WITNESSETH and it is hereby agreed and declared as follows:—

Order of Divorce Court. 1. THIS DEED is executed pursuant to an order of the Probate Divorce and Admiralty Division (Divorce) of the High Court of Justice made by —— on the —— day of —— 19— in a suit of ——.

Transfer of investments. 2. The investments specified in the schedule hereto belong to the Respondent and have been placed by the Respondent in the names of the Original Trustees as security pursuant to the said order for the due payment of the annuity hereinafter mentioned.

Beneficial trusts. 3. The Original Trustees or other the Trustees from time to time of this deed (hereinafter called "the Trustees") shall hold the said investments upon the trusts following that is to say:—

Trust to pay annuity to petitioner. (A) Upon trust out of the income and (in case and to the extent of any deficiency of income in hand) the capital thereof to pay to the Petitioner during the whole of her life an annuity of £—— per annum less tax such annuity commencing as from the —— day of —— 19— (up to which day it has been paid) and continuing until the death of the Petitioner and to be paid by equal quarterly payments on the —— day of —— the —— day of —— the —— day of —— and the —— day of —— in every year the first payment to be made on the —— day of —— 19— and to be for the amount payable in respect of the period then expired since the commencement of the said annuity

Trust to restore sums raised out of capital. (B) Subject as aforesaid upon trust out of the income thereof to restore to capital all sums raised out of capital under the foregoing provision all sums so restored to capital being held in all respects on the same trusts as the said investments

Trust of balance of income for respondent. (C) Provided always that notwithstanding anything hereinbefore contained the whole of the income of the said investments shall be paid to the Respondent his executors administrators or assigns so long as

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(*a*) This precedent is based on a form supplied by Mr. A. H. Withers, of Lincoln's Inn. A somewhat similar form, also supplied by Mr. Withers and to be found in *The Conveyancer* (Old Series), Vol. VII, p. 578, is open to the objection that under an order of the Divorce Court, directing security for maintenance, no personal covenant for payment can be required. See *Shearn* v. *Shearn*, [1931] P. 1, at p. 4, and cases there cited. This precedent is designed to meet the case where the respondent objects to a covenant for payment.

In many cases the respondent finds it convenient himself to pay the annuity during his life direct into the petitioner's banking account and wishes the trustees to pay to him the income of the deposited investments. Paragraph (C) of clause 3 is designed to deal with this point. Compare clause 2 on pages 538–9 of *Key and Elphinstone's Precedents*, 14th ed., Vol. II, which leaves the trustees under the obligation to see that the annuity is punctually paid.

The precedent may need the addition of other clauses appropriate to a trust—such as an investment clause.

The precedent assumes that the security will be money or Stock Exchange securities. If the security includes land, the land should be subjected to a trust for sale or made the subject of a trust instrument and vesting deed.

no sum remains to be restored to capital under the foregoing provision and either (1) the Trustees have in hand or coming to them enough money to enable the Trustees punctually to pay the next [two] quarterly instalments of the said annuity or (2) the Trustees have had notice that other arrangements satisfactory to the Petitioner have been made for payment of the said annuity and the Trustees have not had notice that any quarterly instalment of the said annuity was not paid under such arrangements within —— days of the day in which the same became due under the foregoing trust

(D) Subject as hereinbefore provided the said investments and the income thereof shall be held in trust for the Respondent absolutely. Trust of capital.

4. (A) The power of appointing a new trustee hereof in the place of the said C or of any trustee succeeding mediately or immediately to [his place] the place of either of them shall be vested in the Respondent his assigns or administrators Power to appoint trustees.

(B) The power of appointing a new trustee hereof in the place of the said D or of any trustee succeeding mediately or immediately to [his place] the place of either of them shall be vested in the Petitioner during her life

(C) On any appointment not more than one trustee shall be appointed to fill any one vacancy and no new trustee shall be appointed save to fill a vacancy in the trusteeship.

5. Any trustee for the time being hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional and other charges for business done by him or his firm in the premises whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person. Power for professional trustee to charge.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[*Particulars of the investments referred to in the above-written deed.*]

Form 25

Voluntary Settlement in favour of the children (present and future) of a living person, tying up their respective shares (*a*).

Drafted by A. H. Withers, Barrister-at-Law

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Settlor") of the one part and B of *etc.* and C of *etc.* (hereinafter called "the Original Trustees") of the other part Parties.

(*a*) Stamp *ad valorem.* Settlements by deed in favour of the children, present and future, of a living person, who is given no life interest in priority to the trusts for his children, were practically unknown until recent taxation created a demand for such

Recitals: transfer of fund to trustees;

WHEREAS the Settlor being absolutely entitled to the moneys and investments specified in the schedule hereto and being desirous of settling the same in manner hereinafter appearing has paid or transferred or is about to pay or transfer the same to the Original Trustees to the intent that the same shall be held on the trusts hereinafter declared

relationship of beneficiaries to settlor;

AND WHEREAS D of *etc.* is a —— of the Settlor and is hereinafter referred to as "the Parent" (*b*)

birth of children.

AND WHEREAS the Parent has been married once only namely on the —— day of —— to —— and has —— children and no more namely E who was born on the —— day of —— and F who was born on the —— day of ——.

Witnesseth.

NOW THIS SETTLEMENT WITNESSETH and it is hereby AGREED and DECLARED as follows:—

Settlement to be irrevocable.

1. THIS settlement is irrevocable and is made in accordance with the aforesaid desire of the Settlor and in consideration of the natural love and affection of the Settlor for the Parent and the children of the Parent and for divers other good causes and considerations.

2. IN this settlement the following expressions have the following meanings that is to say:—

Definition clause.

(A) "The trustees" means the Original Trustees or the [survivors or] survivor of them or other the trustees or trustee for the time being of this settlement and (notwithstanding any context) a sole trustee may act for all the purposes of this settlement

(B) "The trust property" means and includes (1) the moneys and investments specified in the schedule hereto (2) all moneys and investments paid or transferred to and accepted by the trustees as additions to the trust property (3) the investments and property from time to time representing the same moneys investments and additions or any part or parts thereof respectively

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settlements. Such settlements must be somewhat complicated as the number of the future children (if any) is uncertain, and it is necessary to provide for the disposal of the income of their shares accruing either before their births or whilst no child at all may be in existence. The provisions of clause 4 of this precedent are intended to deal with this particular difficulty as to the disposal of income, and are believed to be a novel and substantial improvement on clauses 3 and 4 of the somewhat similar precedent to be found in the *Conveyancer and Property Lawyer* (New Series), Vol. 11, pp. 342 *et seq.*

There is nothing special or novel in clause 5. Its general scheme is to tie up each share as strictly as possible, and yet to enable the settlement of a share to be terminated when it is considered inadvisable to let the settlement continue. Such of the sub-clauses of clause 5 as are not wanted can be struck out, and usually the excision of a sub-clause entails few (if any) alterations in subsequent clauses. The beneficial trusts in clause 5 can (if desired) be exceedingly short and simple.

Under this precedent, the only income accumulated is that accruing during the infancy of prospective beneficiaries. This avoids accumulation during the life of the settlor which may attract estate duty on the settlor's death.

This precedent, with or without alteration, should be used with the utmost caution, and only after very careful consideration as to the effect of the settlement on the settlor's liability to surtax and on the liability to estate duty on the settlor's death. Further, in view of s. 29 of the Exchange Control Act, 1947, it should be ascertained that, at the date of the settlement, none of the proposed beneficiaries is resident out of the United Kingdom and "the scheduled territories".

(*b*) If the settlement is on the children of the settlor, he should be called the settlor or the parent throughout the settlement.

(C) "The closing date" means the —— day of —— 19— (*c*)

(D) "The Parent's children" means and includes (1) the children hereinbefore named of the Parent and (2) all the children of the Parent who shall hereafter actually be born before the closing date

(E) "The appointed day" means the day on which expires the period of 21 years calculated from and after the death of the last survivor of such of the following persons as have been born before and are living at the date of this settlement namely the descendants of the Settlor's father and the descendants of His late Majesty King George the 5th.

Division of fund into shares.

3. FOR the purposes hereinafter appearing the trust property shall forthwith be appropriated to such of the Parent's children as have already been born in equal shares [save that the share appropriated to a male shall be double the share appropriated to a female].

Provision for after-born children.

4. (A) On the birth hereafter and before the closing date of a child of the Parent a share of the trust property shall for the purposes hereinafter appearing be appropriated to such after-born child of the Parent on the footing (and every prior appropriation of a share of the trust property shall be rectified on the footing) that such after-born child was born before the date of this settlement and was hereinbefore named as one of the Parent's children in addition to the children of the Parent in fact hereinbefore named and to his or her brothers and sisters (if any) previously but hereafter born and that all sums then already taken out of capital for the benefit of any of the Parent's children have to be brought into hotchpot by the share of capital appropriated to such child and have to be accounted for accordingly

(B) All income as it accrues due before the closing date shall belong and be distributed and dealt with under the provisions hereinafter contained on the footing that no child of the Parent will thereafter be born save that all accumulations of the income to which a child of the Parent would have been entitled if he or she had attained the age of 21 years shall follow and devolve into the capital of the settled share appropriated to such child

(C) Save as hereinbefore otherwise expressly provided in this clause no person being or claiming under or in succession to a child hereafter born to the Parent shall have any interest in or claim in respect of any property taken out of settlement before his or her birth or any income which accrued before his or her birth

(D) All income accruing whilst the closing date has not arrived and no descendant of the Parent is living shall be paid to —— (*d*)

(E) The provisions of the next following clause hereof shall take effect subject to the foregoing provisions of this clause.

Beneficial trusts :

5. SUBJECT to the provisions of the last preceding clause hereof all property in this deed directed to be appropriated to any one of the

(*c*) The class of children to take should be fixed as soon as possible—*e.g.*, the date when the eldest infant child will attain the age of 21 years.

(*d*) Usually the person here named should not be the settlor. This may be important for income tax purposes and, in spite of *Commissioners for Stamp Duties of New South Wales* v. *Perpetual Trustee Co., Ltd.*, [1943] A. C. 425, for estate duty purposes. The wording may have to be altered if a child already born is not one of the "parent's children".

Parent's children shall be held on the trusts and with and subject to the powers and provisions following that is to say:—

definition clause.

(A) Such property is in this clause referred to as "the Settled Share" and that one of the Parent's children to whom the same is directed to be appropriated is hereinafter in this clause referred to as "the Beneficiary"

Overriding power of appointment.

(B) The trustees shall hold the Settled Share and the income thereof UPON TRUST for such person or persons (whether or not being or including the Beneficiary) for such purposes and with and subject to such powers and provisions and generally in such manner in all respects as the Beneficiary and either (1) any two other persons (being trustees of this settlement) or (2) any trust corporation within the meaning of the Trustee Act 1925 (being a trustee of or the sole trustee of this settlement) shall by any deed or deeds revocable or irrevocable jointly appoint and in default of and until and subject to any such appointment UPON the trusts and with and subject to the powers and provisions hereinafter declared and contained

PROVIDED ALWAYS that the foregoing power shall not be exercised after the appointed day or whilst the Beneficiary is under the age of 21 years or in such a manner that the Settlor or any woman whom he has or shall have married can thereunder receive any benefit of any kind whatsoever

PROVIDED ALWAYS that each trustee shall have an absolute discretion to join or abstain from joining in any such appointment as aforesaid without incurring any responsibility in that behalf and that each trustee in considering whether to join or abstain from joining in any such appointment as aforesaid is hereby authorised and requested (but in no sense required) to consider what under all the circumstances of the case is most for the permanent benefit of the Beneficiary and to give effect to all reasonable requests of the Beneficiary and to ignore entirely the interests of all other persons interested in any manner under the trusts of these presents

Application of income during infancy.

(C) So long as the Beneficiary is alive and under the age of 21 years the trustees may at their discretion pay all or any part of the income of the Settled Share to the Beneficiary (notwithstanding infancy) for his or her own absolute use and benefit or pay or apply all or any part of the income for or towards the maintenance education or benefit of the Beneficiary in such manner as the trustees may think fit (*e*) and shall accumulate the surplus (if any) of the income by appropriating the same to the Beneficiary and investing the same in augmentation of the Settled Share but so long as the Beneficiary is alive and under the age of 21 years the trustees may at any time or times if they think fit apply such accumulations or any part thereof as if the same were income of the Settled Share arising in the then current year

Power to advance children.

(D) The trustees may at any time or times after the death of the Parent or in his lifetime with his consent in writing as to [all or] any part or parts not exceeding in the whole [one quarter free of estate

(*e*) The trustees should not, during the life of the settlor, make any payment for a child without considering the effect on the liability of the settlor for surtax. For tax purposes, the usual authority to pay income to the child's guardian has been omitted.

duty] of the Settled Share transfer or raise and pay or appropriate the same to the Beneficiary for his or her own absolute use and benefit or raise and pay or apply the same for the advancement or otherwise for the benefit of the Beneficiary in such manner as the trustees shall think fit (*e*) but this power shall not be exercised after the appointed day and further after the Beneficiary attains the age of 21 years this power shall not be exercised without the consent in writing of the Beneficiary

PROVIDED ALWAYS that until the closing date the foregoing power may be exercised on the footing that no child of the Parent will thereafter be born but subject to the following provision that is to say the part of the Settled Share dealt with under such power in favour of the Beneficiary shall not exceed one equal —— part of the trust property (*f*) and shall (so far as raised and paid) be treated as producing income at the rate of £4 per centum per annum which shall in the division of the income of the trust property be brought into hotchpot by and as part of the income of the Settled Share

Trusts of income:

(E) Subject as hereinbefore declared the income of the Settled Share accruing whilst the Beneficiary is alive and the appointed day has not arrived shall be held upon the trusts following namely :—

protected life interests;

(i) Upon trust to pay the same to the Beneficiary unless and until some act or event (other than any exercise or any consent to any exercise of any power of appointment or advancement) shall be done or happen before the appointed day whereby such income or any part thereof or interest therein if belonging absolutely to the Beneficiary would become vested in or payable to or charged in favour of some other person or persons or a corporation but no trustee shall for any of the purposes of this settlement be affected by any such act or event before he receives express notice thereof

discretionary trust;

(ii) Subject as aforesaid upon trust during the life and within three years after the death of the Beneficiary to pay or assign the said income to or apply the same in such manner for or towards the discharge of all or any debts or alleged debts or the maintenance and personal support or otherwise for the benefit of all or such one or more to the exclusion of the other or others of the persons mentioned in the next paragraph (iii) of this sub-clause if more than one in such shares as the trustees or a majority in point of number of the trustees shall from time to time in their absolute discretion think proper and so that any payment or application to or for any particular person or purpose shall continue only so long as the trustees or such majority as aforesaid shall think fit.

PROVIDED ALWAYS that on the appointed day the foregoing trust shall cease to operate

objects of discretionary trust;

(iii) The objects of the foregoing discretionary trust are the Beneficiary and the husband or widower wife or widow if any of the Beneficiary and the children and remoter issue of the Parent for the time being in existence whether minors or adults and the person or

(*f*) Advances should be limited to the amount that may reasonably be expected to be the settled share. It is sometimes desired to provide that the advance shall carry interest at a rate determined by the income produced by the investment sold to provide the advance or in some other manner in place of the usual 4 per cent. p. a.

persons in whose company or under whose care or control or by or with whom the Beneficiary may from time to time be residing travelling or employed and such other person or persons as the Beneficiary with the previous consent in writing of the trustees or such majority as aforesaid shall from time to time in writing declare to be an object or objects of such discretionary trust and the person or persons who would have become entitled to the capital of the settled share under the statutes for the distribution of the personal estates of intestates for the time being in force had the Beneficiary died immediately before the payment or application in question possessed of such capital intestate domiciled in England and without ever having been married

PROVIDED ALWAYS that under no circumstances shall the Settlor or any person to whom the Settlor has or shall have been married or any person who is for the time being a trustee of this settlement be an object of such discretionary trust

primary objects of discretionary trust.

(iv) The trustees are requested but not required to treat the Beneficiary and the spouse and issue of the Beneficiary as the primary objects of the foregoing discretionary trust and (under such trust) so far as practicable to pay or apply in each year the whole of the income for that year

Trust for child for life.

(F) Subject as hereinbefore declared the income of the settled share accruing during the life of the Beneficiary shall belong and be paid to the Beneficiary

Power of appointment.

(G) All appointments made by the Beneficiary under the powers conferred by the next two following sub-clauses shall only take effect subject to the following provisions of this sub-clause that is to say :—

(1) no such appointment may be made or revoked after the appointed day

and (2) an appointment by will only operates if the Beneficiary dies before the appointed day

AND on the preparation of every appointment special regard shall be had to the rule against perpetuities

Power to appoint in favour of a surviving spouse.

(H) Subject as hereinbefore declared the Beneficiary may by deed executed prior to and in contemplation of marriage or by will or codicil appoint that as from the death of the Beneficiary or from any later date the income of [all or] any part or parts [not exceeding in all one —— part] of the settled share shall be paid to any person who may be the husband or wife of the Beneficiary at the death of the Beneficiary for the residue of the life of such person or for any less period and subject to any conditions or restrictions the Beneficiary may think fit and any such appointment may provide that all or any part or parts of the appointed income accruing during all or any part or parts of the life of such surviving husband or wife shall be paid to or held by such trustees for such period or periods on such discretionary trusts for or between such persons (including such husband or wife) as the Beneficiary may think fit to appoint or declare save that neither the Settlor nor any woman whom he has married or shall hereafter have married shall be an object of such discretionary trust

(I) Subject as hereinbefore declared the settled share shall be held IN TRUST for all or any to the exclusion of the others or other of the children and remoter issue of the Beneficiary if more than one in such shares and in such manner in all respects as the Beneficiary shall by deed revocable or irrevocable or by will or codicil appoint AND in default of and subject to any such appointment IN TRUST for all or any the children or child of the Beneficiary who shall be living on the appointed day or shall before the appointed day being male attain the age of twenty-one years or being female attain that age or marry and if more than one in equal shares

Power to appoint to issue.

PROVIDED ALWAYS that any share appointed to a child or to his or her issue under the foregoing power shall in default of appointment to the contrary be brought into hotchpot by such child in the division of the unappointed part of the settled share

(J) The trustees may as to any part or parts (not exceeding together one-half free of death duties) of the presumptive or vested share of any person (being a descendant of the Beneficiary) in the settled share transfer or raise and pay or appropriate the same to such person for his or her own absolute use and benefit or raise and pay or apply the same for or towards the education or advancement or otherwise for the benefit of such person in such manner as the trustees may think fit but this power shall not be exercised to the prejudice of any prior trust existing or appointed under any of the trusts or powers hereinbefore in this settlement contained without the consent of the person for the whole or part of whose life such trust shall or may take effect

Power to advance issue.

(K) Subject as hereinbefore declared the settled share shall fall back into the trust property and be held on the same trusts and with and subject to the same powers and provisions as would have been applicable thereto if the Beneficiary had not been born.

Ultimate trust of shares.

6. SUBJECT as hereinbefore declared the trust property and the income thereof as from the date of this deed shall be held in trust for —— (*g*).

Ultimate trust of capital.

7. THE trustees shall have the following powers namely:—

Powers of trustees:

(a) Power to allow the investments specified in the Schedule hereto and all investments transferred to and accepted by the trustees as additions to the trust property as and when the same respectively shall be received in possession by the trustees or any of them or any part or parts thereof respectively to remain in the actual state of investment thereof so long as the trustees may think fit

(b) Power at any time or times with the consent in writing of the Settlor during his lifetime and after his death at the discretion of the trustees to sell call in or convert into money the aforesaid investments or any of them or any part thereof respectively

to sell investments;

(c) Power with such consent or at such discretion as aforesaid to

to invest;

(*g*) An alternate trust for the settlor would not attract estate duty on his death. See *Commissioners of Stamp Duties of New South Wales* v. *Perpetual Trustee Co., Ltd.*, [1943] A. C. 425. Such a trust for the settlor or any woman he may have married may make the income that of the settlor for income tax purposes.

invest (*h*) the moneys produced by such sale calling in or conversion and any other capital moneys which may be received by the trustees in respect of the trust property (when the same respectively shall have been received by the trustees) in the names of the trustees in any manner hereinafter mentioned that is to say:—

(i) In any of the public stocks or funds or government securities of the United Kingdom or of any other country province or place in any part of the world

(ii) Upon the security of immovable property in any part of the world

(iii) In the purchase (whether for income occupation or other purposes) of land in England or Wales being either freehold or held for a term of which not less than fifty years shall be unexpired at the date of purchase all lands so purchased to be held by the trustees upon trust to sell the same with such consent or at such discretion as aforesaid and with full power to postpone conversion

(iv) In or upon the stocks funds shares debentures mortgages or securities of any corporation body or company municipal county local commercial or of any other description incorporated or registered in the United Kingdom or any other part of the world

(v) Upon the security of any interest for a life or lives or determinable on a life or lives or any other event in real or personal immovable or movable property wheresoever situate or arising together with a policy or policies of assurance on such life or lives or against such event

(vi) Upon loan to or deposit with any building society in England or

[(vii) in such other manner (whether or not within the range authorised by law) in such part of the world as to the trustees may seem fit (*i*)]

PROVIDED ALWAYS that (except whilst a trust corporation within the meaning of the Trustee Act 1925 is a trustee of this settlement) no money shall be invested under any of the provisions of this clause in any stocks funds bonds shares or securities to bearer or transferable by mere delivery or delivery and endorsement though coming within the general description of investments hereinbefore authorised

to vary investments;

(d) Power with such consent or at such discretion as aforesaid to vary or transpose any investments into or for any other or others of any nature hereinbefore authorised and to vary the terms of or property comprised in any security

to erect and improve buildings.

(e) Power before the appointed day with such consent or at such discretion as aforesaid to apply any money (not being income) in the erection alteration improvement or structural repair of any buildings on any land held on the same trusts as the moneys applied thereon under this power and (in particular) in the making of any works which though in the nature of improvements are not improvements authorised by the Settled Land Act 1925.

(*h*) The tendency nowadays is to have investment clauses as wide as possible. It is suggested that this investment clause will be more than wide enough for most settlors.

(*i*) See *Re Harari's Settlement Trusts*, [1949] W. N. 79.

8. EVERY discretion or power by this settlement conferred on any person or on the trustees and not expressly made exercisable only during a period allowed by law shall (notwithstanding anything to the contrary hereinbefore expressed or implied) only be exercisable until the appointed day and during such further period if any (whether definite or indefinite) as in the case of the particular discretion or power in question the law may allow (*k*). Limitation on trustees discretions

9. THE power of appointing a new trustee or new trustees of these presents shall be vested in the Settlor during his life. Power to appoint trustees.

10. ANY trustee for the time being hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done by him or his firm in the premises whether in the ordinary course of his profession or business or not and although not of a nature requiring the employment of a solicitor or other professional person. Power for professional trustee to charge.

11. ANY corporation that is a trust corporation within the meaning of the Law of Property Act 1925 (as amended in 1926) and is appointed to be a trustee of this settlement or of any trust hereby created shall have the powers rights and benefits as to remuneration or otherwise (not in any respect higher than the terms hereinafter mentioned) as at or prior to its appointment may be agreed in writing between such corporation and the person or persons making such appointment or (in default of such agreement) in accordance with the corporation's published terms and conditions as to acceptance of trusts current at the date of its appointment (*l*). Provision for trust corporation charges.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO

[*Particulars of the moneys and investments settled by the above-written Deed.*]

Form 26

Assignment by One of Two Tenants in Common of His Share in the Proceeds of Sale to a Third Person and Appointment of the Purchaser by a Separate Deed as Trustee of the Legal Estate in the Place of the Vendor (*a*).

I. Assignment of Share

THIS ASSIGNMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Vendor") of the one part and B of *etc.* (hereinafter called "the Purchaser") of the other part. Parties.

(*k*) Some such clause as this is desirable where the settlement is designed to go on for a long time, to guard against the possibility of some power being given (*e.g.*, by an additional clause) without the requisite restriction to the perpetuity period.

(*l*) This clause is unworkable in the case of banks that have no published terms of trusts under settlements by deed.

(*a*) There are several ways of effecting the conveyance of the legal estate to the new trustees—

(1) The present trustees may join in the assignment to convey it to the new trustees

WHEREAS :—

Recitals: conveyance to tenants in common;

(1) By a Conveyance (hereinafter called "the Conveyance") dated *etc.* and made between X of the one part and the Vendor and C of the other part the freehold property hereinafter described was conveyed to the Vendor and the said C as joint tenants UPON TRUST to sell the same or any part thereof with power to postpone such sale and to stand possessed of the net proceeds of sale (after payment of costs) and of the net rents and profits of such part of the same property as should for the time being remain unsold (after payment of outgoings) IN TRUST for the Vendor and the said C as tenants in common in equal shares

Agreement for sale.

(2) The Vendor has agreed with the Purchaser for the sale to him of the moiety of the net proceeds of the sale and the rents and profits until sale of the said property for the sum of £*y*.

NOW THIS DEED WITNESSETH as follows :—

Assignment.

1. In pursuance of the said agreement and in consideration of the sum of £*y* on or before the execution of these presents paid by the Purchaser to the Vendor (the receipt and payment of which sum the Vendor hereby acknowledges) the Vendor AS BENEFICIAL OWNER hereby assigns unto the Purchaser ALL THAT the moiety to which the Vendor is entitled under the Conveyance of and in the net proceeds of sale and the net rents and profits until sale of ALL THAT [parcels as in the Conveyance] TO HOLD the same unto the Purchaser absolutely.

[2. *Certificate as to value.*]

IN WITNESS *etc.*

II. Appointment

Parties.

THIS DEED OF APPOINTMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Continuing Trustee") of the first part B of *etc.* (hereinafter called "the Retiring Trustee") of the second part C of *etc.* (hereinafter called "the New Trustee") of the third part and the Continuing Trustee and the New Trustee of the fourth part.

WHEREAS :—

Recitals: conveyance on trust for sale;

(1) This Deed is supplemental to a Conveyance (hereinafter called "the Conveyance") dated *etc.* and made between X of the one part and the Retiring Trustee and the Continuing Trustee of the other part whereby certain freehold property situate at —— in the county of —— was conveyed to the Retiring Trustee and the Continuing Trustee as joint tenants UPON TRUST to sell the same or any part thereof with power to postpone such sale and to stand possessed of the net proceeds of sale (after payment of costs) and of the net rents and profits of such part of the same property as should for the time being remain unsold (after payment of outgoings) IN TRUST for themselves as tenants in common in equal shares

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on a new trust for sale; this has the disadvantage of bringing the title to the shares onto the title to the land; but in simple cases this may not be a serious objection.

(2) The purchaser may be appointed a trustee in place of the vendor in the assignment.

(3) He may be so appointed by a separate deed. The last is probably the best method and is the one adopted in these precedents. The forms can easily be adapted to cases where the property is held on the statutory trusts.

(2) The Retiring Trustee is desirous of retiring from the trusts declared by the Conveyance and the Continuing Trustee and the Retiring Trustee are desirous of appointing the New Trustee to be a trustee of the same trusts in the place of the Retiring Trustee. desire to retire and appoint ne trustee.

NOW THIS DEED WITNESSETH as follows :—

1. In exercise of the power for this purpose conferred by the statute in that behalf and of any and every other power them hereunto enabling the Continuing Trustee and the Retiring Trustee hereby appoint the New Trustee to be a trustee in the place of the Retiring Trustee and to act jointly with the Continuing Trustee for the purposes of the aforesaid trusts declared by the Conveyance or such of the same purposes as are subsisting and capable of taking effect. Appointme of new trustee in place of retiring trustee.

2. Section forty of the Trustee Act 1925 shall apply to this Appointment. Vesting declaration

IN WITNESS *etc.*

Form 27

Agreement between Medical Practitioner and Assistant.

(*Drafted by E. H. Bodkin, of Lincoln's Inn*)

AN AGREEMENT made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called " the Principal ") of the one part and B of *etc.* (hereinafter called " the Assistant ") of the other part. Parties.

WHEREBY it is agreed as follows :—

1. The Principal hereby agrees to engage the Assistant and the Assistant hereby agrees to serve the Principal as assistant in every branch of the Principal's profession practice and business of a general medical practitioner [whether for private patients or under the National Health Service Act 1946 or any statutory modification or re-enactment thereof or the Regulations for the time being in force thereunder respectively] from the —— day of —— 19— for the period of —— years and thereafter until his engagement shall be terminated by notice as hereinafter provided. Agreement for service.

2. The Principal will pay the Assistant so long as he shall remain in his service and duly perform the agreements on his part hereinafter contained a salary at the rate of £—— per annum payable by equal monthly instalments on the first day of each month the first payment [being an apportioned sum] to be made on the first day of —— next after the date hereof (*a*). Salary.

3. The Assistant shall during the continuance of his service faithfully and diligently serve the Principal as such assistant as aforesaid and devote his whole time and attention to such service and to the utmost of his skill and ability serve and promote the interests of the Principal and at all times (a) will obey and comply with the lawful Assistant to serve faithfully, etc.

(*a*) The salary must not, if the Principal has entered the Health Service, be fixed at a sum substantially less than the Assistant's services are worth, in contemplation of his succeeding to a share of the Principal's goodwill, otherwise an offence will have been committed under s. 35 (5) of the National Health Service Act, 1946.

orders and directions of the Principal in relation to the said business and practice (b) will not commit any breach of professional etiquette or conduct (c) will not (except in the case of illness accident or other unavoidable cause) absent himself from the service of the Principal without his consent (d) will not without the consent of the Principal disclose any of the secrets concerns or affairs of the Principal's business or practice (e) will keep proper accounts of all attendances made by him and all moneys paid to him on account of the Principal and forthwith pay over all such moneys to the Principal.

Assistant not to absent himself.

4. If the Assistant shall absent himself for any reason other than illness accident or other unavoidable cause for a continuous period of more than —— days the Principal may engage and pay a substitute and deduct the cost of so doing from the salary payable to the Assistant hereunder.

Principal to provide board and lodging.

5. The Principal shall during the continuance of the Assistant's service provide him with suitable board and lodging (but not laundry) at a reasonable distance from the Principal's surgery or consulting room for the time being.

Power to determine.

6. Either party may terminate the Assistant's service hereunder by one month's notice in writing to the other party.

Assistant not to compete.

7. The Assistant shall not at any time during the continuance of his service hereunder or within [5] years thereafter within a radius of —— miles from No. — —— Street (a) whether alone or in partnership with any other person or as assistant to any other person engage in the practice of a general medical practitioner or any branch of medicine surgery or midwifery usually performed by a general medical practitioner (b) prescribe or perform any specialised treatment in medicine surgery or midwifery directly for or on the request of any patient who is not introduced to him by another medical practitioner (c) be concerned or interested whether directly or indirectly and whether financially or otherwise in any competing professional business carried on within the area aforesaid (d) endeavour directly or indirectly to induce any person to cease from employing the Principal in the way of his profession practice or business or to induce any person so to employ any person other than the Principal PROVIDED that this present provision shall not prevent the Assistant from practising as a consultant physician or surgeon within the period and area aforesaid.

AS WITNESS *etc.*

Form 28

Conveyance by Trustees to a Residuary Devisee on the Division of the Residue in Specie (*a*).

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Trustees") of the first part C of *etc.* of the second part D of *etc.* of the third part and E of *etc.* (hereinafter called "the Beneficiary") of the fourth part. Parties.

WHEREAS:— Recitals:

(1) X late of —— in the county of —— (hereinafter called "the Testator") by his Will dated *etc.* after appointing the Trustees to be the executors and trustees thereof and bequeathing certain pecuniary legacies devised and bequeathed all his real estate and the residue of his personal estate to his trustees upon trust to sell and convert the same as therein mentioned and to invest the net proceeds of sale after payment of his funeral and testamentary expenses debts and legacies and to hold the said proceeds of sale and conversion and the investments from time to time representing the same UPON TRUST for the Beneficiary and the said C and D in equal shares will of testator;

(2) The Testator died on the —— day of —— 19— without having revoked or altered his said Will which was on the —— day of —— 19— duly proved by the Trustees as the executors therein named in the —— Probate Registry death and probate;

(3) Shortly after the death of the Testator the Trustees paid his funeral and testamentary expenses and debts and the duties payable on his death and paid or provided for the legacies bequeathed by his said will and the net residuary estate of the Testator remaining after the payments aforesaid is now represented by the real estate and investments specified in the several parts of the Schedule hereto administration of estate;

(4) By an Assent in writing dated the —— day of —— 19— the Trustees as personal representatives of the Testator assented to the vesting in themselves of the real estate specified in the said Schedule hereto upon the trust for sale declared by his said Will assent of freeholds;

(5) It has been agreed by and between the Beneficiary and the said C and D that they shall put an end to the trusts for sale and conversion declared by the said Will in relation to the said real estate and investments specified in the said Schedule hereto and that the real estate and investments specified in the First Part of such Schedule (such real estate being the property hereinafter assured) should be conveyed and transferred to the Beneficiary and that the real estate and investments specified in the Second Part of such Schedule (such real estate being part of the —— Estate of which the Testator was seised in fee simple at his death and which part is more particularly described in a Conveyance bearing even date herewith and made between the Trustees of the one part the Beneficiary of the second part the said D of the third agreement for division

(*a*) An alternative method of carrying out the transaction would be to have a short separate agreement between the residuary devisees to bring the trusts to an end and divide up the property. If the property is appropriated under the statutory power, *ad valorem* stamp duty may be payable on the assent or agreement. The present form of conveyance will only, it is submitted, require a 10s. stamp; on the other hand the trusts will be brought on to the title.

part and the said C of the fourth part) should be conveyed and transferred to the said C and the real estate and investments specified in the Third Part of the same Schedule (such real estate being the residue of the said —— Estate) should be conveyed and transferred to the said D.

NOW THIS DEED WITNESSETH as follows:—

1. The Trustees As TRUSTEES and with the concurrence hereby testified of the said C and D hereby convey unto the Beneficiary ALL THAT *etc.*

TO HOLD the same unto the Beneficiary in fee simple freed and discharged from the said trust for sale.

2. The Trustees hereby acknowledge the right of the Beneficiary to production of the Probate of the said will of the Testator (possession whereof is retained by them) and to delivery of copies thereof.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

First Part.

Real estate and investments to be conveyed and transferred to the Beneficiary.

Second Part.

Real estate and investments to be conveyed and transferred to C.

Third Part.

Real estate and investments to be conveyed and transferred to D.

Form 29

Settlement of Investments and Reversionary Interest on Present and Future Children to Avoid Income Tax and Surtax. Present-born Children's Shares Vesting at Twenty-five or Marriage with Power of Maintenance until Vesting, Future-born Children's Shares being Settled (*a*).

Drafted by E. H. Bodkin, Barrister-at-Law

THIS SETTLEMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Settlor") of the one part and B of *etc.* and C of *etc.* (hereinafter called "the Trustees") of the other part Parties.

WHEREAS :— Recitals:

(1) The Settlor is desirous of making some provision for his present-born children viz. D who was born on the —— day of —— 19— E who was born on the —— day of —— 19— and F who was born on the —— day of —— 19— and for any after-born children of his by any wife desire to settle;

(2) Under and by virtue of a Settlement (hereinafter called "the Settlement of 19—") dated *etc.* and made *etc.* and a deed poll of appointment under the hand and seal of G the Settlor as one of the children of the said G is absolutely entitled to one equal third part or share of the trust funds and property subject to the Settlement of 19— subject to the life interest of the said G therein title to reversionary share;

(3) With a view to the Settlement hereinafter contained the Settlor has transferred to the Trustees the investments mentioned in the Schedule hereto to which he is absolutely entitled to be held by them upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same. transfer of investments.

NOW THIS DEED made in consideration of the natural love and affection of the Settlor for his said children and of the premises WITNESSETH and it is hereby agreed and declared as follows :—

1. The Settlor AS SETTLOR hereby assigns unto the Trustees ALL THAT the said equal third part or share to which he is entitled under the Settlement of 19— and the said deed poll of appointment of or in the trust funds and property comprised in the Settlement of 19— expectant on the life of the said G. Assignment of share.

2. The Trustees shall stand possessed of the premises hereinbefore Trust to sell or retain.

(*a*) Settlors often wish to postpone the vesting of children's shares until twenty-five or even later. If this is desired, it may be better to continue the power of maintenance until vesting, as if the income is not absolutely payable to the child estate duty will not be payable if he dies under the vesting age. On the other hand provision must be made for payment of the surplus income to some other person, as accumulation can only continue during minority or the life of the settlor. If the latter period is chosen, estate duty may become payable under s. 2 (1) (d) of the Finance Act, 1894, in the event of the settlor dying when the child is between twenty-one and twenty-five, by reason of the income becoming on his death absolutely payable to the child. There seems no objection to making the surplus income payable to the other children (if any) or the ultimate remainderman after the child attains twenty-one in cases where the whole income is likely to be required for maintenance and thus avoiding a passing of the property on the settlor's death. Income actually paid or applied for maintenance in any year of assessment at the commencement of which the child is an infant, and unmarried, will be treated as the settlor's income for income tax and surtax purposes. This is unavoidable; but after April 5, following his majority or marriage or, of course, after the settlor's death the whole can be safely so applied.

As to the objections to including future-born children in the settlement, see note (*e*), *post*.

assigned and the said investments mentioned in the said Schedule hereto UPON TRUST either to allow the said premises as and when the same fall into possession and are received by them and the said investments mentioned in the said Schedule hereto to remain as actually invested or at any time or times [with the consent of the Settlor during his life and after his death] at their discretion to sell the same or any part thereof and [with the like consent or] at the like discretion to invest the net proceeds of sale and any capital money received in respect of the premises hereinbefore assigned in or upon any of the investments hereinafter authorised with power with the like consent or at the like discretion to vary any such investments for others of a like nature.

3. The Trustees shall stand possessed of the premises hereinbefore assigned and of the said investments mentioned in the said Schedule hereto and of the investments for the time being representing the same (hereinafter called the "Trust Fund") Upon the trusts and with and subject to the powers and provisions following that is to say—

Trust for present- and future-born children.

(1) UPON TRUST for all or any the present-born children or child of the Settlor hereinbefore named who shall attain the age of twenty-five years or shall be living on the 5th day of April next after his or her marriage and all or any the after-born children or child of the Settlor by his present or any after-taken wife who shall attain the age of twenty-one years or being female marry under that age and if more than one in equal shares

Power of maintenance out of present children's shares until vesting.

(2) The power of maintenance in the Trustee Act 1925 shall continue to apply to the share of a present-born child and the accumulations of income thereof until he or she attains a vested interest or dies but so that after such child attains the age of twenty-one years any income not paid or applied under the said power [and any income accruing under this present provision shall be added to the income of the shares of the other present-born and after-born children of the Settlor (other than a share which has been transferred to the person or persons entitled thereto) and if more than one in equal shares and so that the income so accruing shall be held upon the trusts and with and subject to the powers and provisions applicable to such original share so far as circumstances permit] [shall be payable to the person or persons for the time being presumptively entitled to the capital of the Trust Fund]

Power of advancement.

(3) At any time or times (but in case of an after-born child not later than the expiration of twenty-one years from the death of the survivor of the Settlor the said present-born children of the Settlor and the issue now living of His late Majesty King George V the Trustees may in their absolute discretion pay or apply the whole or any part of the presumptive or vested share of a present-born or after-born child for his or her advancement or benefit or if he or she has attained twenty-two years may pay and transfer any such capital to such child for his or her own use and benefit [notwithstanding such share may be liable to decrease by the birth of other children of the Settlor] (*b*).

(*b*) Advances made out of accumulations of income may be treated as the settlor's income for income tax and surtax purposes under s. 21 of the Finance Act, 1936. Consequently, accumulated income should be invested in separate investments and kept distinct from original capital.

4. The share of the Trust Fund hereinbefore directed to be held in trust for each of the after-born children of the Settlor shall not vest absolutely in such child but shall be retained by the Trustees and held by them upon the trusts and with and subject to the powers and provisions following that is to say (*c*) :— Trusts of future-born children's shares;

(1) UPON TRUST to pay the income thereof to such child during his or her life for child for life;

(2) During the residue of the life of the Settlor or until the 5th day of April next after the child attains the age of twenty-one years if he or she and the Settlor shall so long live or until he or she shall die in the lifetime of the Settlor (whichever period shall be the shorter) the statutory power of maintenance shall continue to apply to the income of such child's share and the income of the statutory accumulations thereof

(3) The statutory power of maintenance shall not be excluded by anything herein contained in the event of the Settlor dying during the minority of such child power of maintenance

(4) After the death of such child the capital and future income of his or her share shall be held IN TRUST for the children or child of such after-born child of the Settlor who shall be born in the lifetime of the [survivor of the] Settlor [and his present wife] and shall attain the age of twenty-one years or being female shall attain that age or marry under that age and the children or child of such after-born child who shall be born after the death of the [survivor of] the Settlor [and his said wife——] and shall be living at the expiration of twenty-one years from the death of such survivor or in the case of daughters shall have previously married and if more than one in equal shares after death for children of child born within perpetuity period.

(5) The statutory powers of maintenance and advancement shall apply for the benefit of a child of such after-born child. Powers of maintenance and advancement.

5. Subject to the trusts hereinbefore declared and to any exercise of the powers hereby or by law conferred on the Trustees the capital and income of the Trust Fund shall be held IN TRUST for H absolutely (*d*). Ultimate trust.

6. During any period during which there shall be no person in

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(*c*) The clause making the surplus income payable after the child attains twenty-one to the other children or to the ultimate remainderman cannot be used in the case of after-born children, as the uncertainty as to the ultimate destination of the income would offend against the perpetuity rule. The settlor's life must therefore be chosen as the period during which the power of maintenance is to continue, and estate duty will, it seems, be payable on the capital value of the share in the event of the settlor's death, and consequent cesser of the power when the child is over twenty-one and before the power ends: *Re Hodson's Settlement*, [1939] Ch. 343.

(*d*) The ultimate trusts in this clause should not be for the settlor or, it seems, for any woman he may marry, as this might not be within the exception to s. 38 of the Finance Act, 1938, and s. 28 of the Finance Act, 1946.

After-born children cannot be given absolute interests vesting at any age over twenty-one, as this would offend against the perpetuity rule. If their interests vested at twenty-one they could require payment over of their shares, notwithstanding any power or trust for accumulation; and this right would render any accumulations of income liable to be treated as the settlor's income for purposes of income tax and surtax in the year in which they attained twenty-one. The best way of getting over the difficulty appears to be to settle the shares as above; but owing to the rule against perpetuities the trusts are not wholly satisfactory, and the gift over on failure of the trusts must be to a person ascertained at the date of the settlement and not to the other children.

But no form of settlement which includes future-born children can be said to be wholly satisfactory.

existence to or for whose benefit any income or share of income is payable under the trusts hereinbefore declared concerning the shares of the present- and after-born children of the Settlor such income or share of income shall be payable to the person or persons who are for the time being presumptively entitled to the capital of the Trust Fund.

Investment clause.

7.—(1) Money subject to the trusts hereof may be invested in or upon

(i) The Public Stocks Funds or Government securities of the United Kingdom or any colony

(ii) Securities the interest on which is guaranteed by Parliament

(iii) Metropolitan or London County Stock or the stocks bonds debentures or other securities of any Municipality County or District Council public body or local authority in the United Kingdom

(iv) The bonds debentures debenture or rentcharge stock mortgages obligations or securities or the guaranteed preference or ordinary stock or shares of any company public or private (wherever carrying on business) incorporated by Special Act or by or under any Public General Act or Acts of the Imperial Parliament or the legislature of any Colony or by Royal Charter

(v) The security of any interest for life or vested or contingent interest in real or personal property in the United Kingdom together with a policy of assurance on the life or against the contingency

(vi) Freehold or leasehold securities (whether or not by registered charge under the Land Registration Act 1925) together in the case of leaseholds having less than sixty years to run at the date of such investment with a sinking fund policy for securing a sum not less than 20 per cent. larger than the sum lent

(vii) The purchase of freehold ground rents or other landed property in England or Wales of any tenure but leaseholds only if at least sixty years of the term on which the same are held is unexpired

(viii) The shares or deposits of any permanent Building Society registered in the United Kingdom

(2) For the purposes of this clause the expression "United Kingdom" shall mean the United Kingdom of Great Britain and Ireland and "Colony" shall mean any dominion commonwealth union dependency or colony forming part of the British Empire or any province or state having a local legislature and forming part thereof respectively but not the Irish Free State

Power to raise money, etc.

(3) The Trustees may raise and apply trust money in (i) making improvements upon any land subject to the trusts hereof or in erecting repairing making structural alterations in or pulling down and rebuilding buildings or other erections on the same (ii) Complying with the requirements of any order or direction under the Agriculture Act 1947 or the obligations imposed by or under any statute statutory instrument rule or order or regulation (iii) Payment of the costs of and incidental to obtaining permission for development of or payment of compensation in respect of any land subject to the trusts hereof pursuant to any Acts relating to planning control and all compensation (whether for depreciation of development value or otherwise) shall be capital

Power to make arrangements, etc.

(4) The Trustees shall have power (i) to make such arrangements upon the reconstruction of any company in which they hold stocks

shares or securities as if they were the absolute owners of such stocks shares or securities (ii) to release part of any property subject to a security held on the trusts hereof if satisfied that the remaining security is sufficient to cover all money remaining due thereon and to vary the terms of any such security (iii) to contract that any sum invested by them on mortgage shall not be called in for any period they shall think fit.

Power to determine questions and appropriate.

8. The Trustees may (i) determine what moneys are to be considered as capital and what income (ii) determine what expenses costs outgoings or losses are properly payable out of capital or income (iii) exercise the powers of appropriation conferred by section 41 of the Administration of Estates Act 1925 without any of the consents requisite for the execution of such powers by personal representatives (iv) determine all matters of doubt and questions arising in the execution of the trusts and powers hereof and every such determination (whether expressly or impliedly made) shall be conclusive and binding upon all persons then or thereafter to become interested hereunder.

Trustees' indemnity.

9. The Trustees shall not be liable for any loss occasioned to the trust property by any investment made by them in good faith and in the belief that the same was a proper investment.

Power for professional trustee to charge.

10. Any trustee for the time being of this Settlement who is a solicitor or is engaged in any other profession or business may charge and be paid all usual professional or other proper charges for business done and time expended by him or his firm in relation to the trusts hereof including reasonable charges in addition to disbursements in respect of matters which could have been attended to personally by a trustee who was not in any profession or business.

Power to appoint new trustees.

11. The power of appointing a new trustee or new trustees of this Settlement shall be vested in the Settlor during his life.

Covenant to pay duty on settlor's death within five years.

[12. The Settlor hereby covenants with the Trustees that he or his personal representatives will discharge any duty which may become payable in respect of the Trust Fund by reason of his death within five years of the date hereof immediately upon the same becoming payable.]

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO

[This will contain particulars of the investments settled.]

Form 30

Indemnity to Personal Representatives on Redemption of Life Interest of Widow in Part of Her Husband's Residuary Estate (*a*).

Parties.

THIS INDEMNITY is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called " the Life Tenant ") of the one part and

(*a*) Under s. 46 of the Administration of Estates Act, 1925, personal representatives can (with his or her consent) purchase or redeem the life interest of a surviving husband or wife in the residuary estate of the deceased spouse who has died intestate, by paying the capital value thereof reckoned according to tables selected by them to the surviving husband or wife or the persons deriving title under him or her, and the costs of the transaction; and thereupon the residuary estate may be dealt with free from such life

B of *etc.* and C of *etc.* (hereinafter called "the Personal Representatives") of the other part.

Recitals:

WHEREAS:—

death of husband intestate;

(1) D late of —— in the county of —— (hereinafter called "the Intestate") died on the —— day of —— 19— intestate and on the —— day of —— 19— letters of administration to his estate were granted out of the —— Probate Registry to the Personal Representatives

next-of-kin;

(2) The Intestate had issue two children and no more *viz.* —— and ——

administration of estate;

(3) The Personal Representatives have paid the funeral testamentary and administration expenses debts and other liabilities of the Intestate and the duties payable on his death and have paid the net sum of £1000 and interest thereon from the date of his death to which the Life Tenant as his widow is entitled under the Administration of Estates Act 1925 and handed over to her the personal chattels as defined by that Act and the residuary estate of the Intestate was immediately prior to the payment hereinafter mentioned represented by the investments [and cash] specified in the Schedule hereto in one moiety whereof the Life Tenant was entitled to a life interest

redemption of life interest in part;

(4) Under and by virtue of the powers vested in them by section 48 of the Administration of Estates Act 1925 the Personal Representatives have with her consent purchased and redeemed [the life interest of the Life Tenant as the lawful widow of the Intestate in one equal fourth part] [£—— of the income] of the said moiety of the said residuary estate in consideration of the payment to the Life Tenant of the sum of £*x* as she hereby admits and acknowledges

payment of price;

(5) The said sum of £*x* was paid out of the [net proceeds of sale of the sum of £—— —— stock] [the sum £—— cash] mentioned in the said Schedule

capital valuation;

(6) The capital value of [the said life interest in one equal fourth part] [£—— of the income] of the said moiety of the residuary estate was reckoned according to the [Succession Duty] [Government Annuity] tables

medical examination;

(7) The Life Tenant was at the request of the Personal Representatives medically examined and passed as a first class life

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interest. If the life tenant is the sole personal representative the leave of the Court is necessary. The capital sum necessary for the purpose and the costs properly incurred, or any part not satisfied by the application for that purpose of any part of the residuary estate, may be raised on the security of the residuary estate or any part thereof except the personal chattels.

It is not quite clear whether the section would authorise the redemption of part of the life interest of the surviving spouse. The section was presumably directed primarily to the division of the estate between the tenant for life and remaindermen according to the actuarial value of their respective interests. If the life interest in any aliquot part of the estate is redeemed, investments can be appropriated to that part and there is no logical objection to the transaction as the section authorises redemption in the case where there are children, and the spouse has a life interest in a moiety only. But if a sum of so much per annum is redeemed the estate must be kept together, and the transaction is in essence a purchase of an annuity charged on the life interest. In such a case, and indeed, in all cases where part of the life interest is redeemed, the personal representatives should require an indemnity from the life tenant. Further, the life tenant should be medically examined, as if his or her expectation of life is bad the personal representatives would not be justified in carrying out the proposed purchase.

As the sale is to the personal representatives and not the remaindermen, estate duty would not it seems be payable on the death of the widow within five years.

(8) It was agreed that upon such redemption being made as aforesaid the Life Tenant should give the Personal Representatives such indemnity as is hereinafter contained. agreement to indemnity.

Now in pursuance of the said agreement and in consideration of the premises THIS DEED WITNESSETH that the Life Tenant hereby covenants with the Personal Representatives and with each of them that she the Life Tenant her executors and administrators will at all times hereafter keep the Personal Representatives and each of them and their and each of their executors and administrators effectually indemnified against all actions proceedings claims and demands on the part of the said children of the Intestate or either of them or their respective personal representatives or any other person or persons whomsoever and all costs charges and expenses in respect of [the said life interest in one equal fourth part [£—— of the income] of the said moiety of the residuary estate of the Intestate so redeemed and purchased as aforesaid and the said sum of £*x* so paid by the Personal Representatives for the purchase and redemption thereof or in any way arising out of or consequential upon such redemption purchase and payment as aforesaid or otherwise in respect of the premises. Covenant of indemnity.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO

[Investments and cash representing residuary estate.]

Form 31

Receipt by Widow for Payment of Capital Value of Life Interest in Moiety or Lesser Part of Her Husband's Residuary Estate (*a*).

WHEREAS :—

(1) I A of *etc.* am entitled as the lawful widow of X deceased to a life interest in one moiety of his residuary estate

(2) Under and by virtue of the powers vested in them by section 48 of the Administration of Estates Act 1925 B and C as the personal representatives of the said X have agreed with my consent to pay me £*x* out of monies forming part of his residuary estate for the redemption of my life estate in [one equal —— part of] the said moiety of the said residuary estate.

Now I hereby acknowledge that I have this —— day of —— received from the said B and C the said sum of £*x* agreed to be paid as aforesaid in redemption and satisfaction of the income of [one equal —— part of] the said moiety of the residuary estate of the said X deceased payable to me during my life as aforesaid.

AS WITNESS *etc.*

(*a*) See Notes to last Precedent. If an indemnity is being given to the personal representatives a separate receipt is not essential, as the payment will be recited therein.

Form 32

Conveyance to Personal Representatives of House Purchased as a Residence for the Beneficiaries (*a*).

Parties. THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Vendor") of the one part and C of *etc.* and D of *etc.* (hereinafter called "the Purchasers") of the other part.

Recitals: WHEREAS:—

seisin of vendor; (1) The Vendor is seised in fee simple in possession free from incumbrances of the property hereinafter described

agreement for sale. (2) The Purchasers have agreed with the Vendor to purchase from him the estate in fee simple in the same property free from incumbrances at the price of £*x*.

NOW THIS DEED WITNESSETH as follows:—

Conveyance. 1. In pursuance of the said agreement and in consideration of the sum of £*x* on or before the execution of these presents paid by the Purchasers to the Vendor (the receipt and payment of which sum the Vendor hereby acknowledges) the Vendor AS BENEFICIAL OWNER hereby conveys unto the Purchasers

Parcels. ALL THAT *etc.*

Habendum. TO HOLD unto the Purchasers in fee simple

Trust for sale. 2. The Purchasers shall stand possessed of the property hereinbefore conveyed UPON TRUST that they shall sell the same or any part thereof with power to postpone such sale and shall hold the net proceeds of any such sale (after payment of costs) and of the net rents and profits of such part of the same as shall for the time being remain unsold (after payment of rates taxes costs of insurance repairs and other outgoings properly attributable to income) upon the trusts and with and subject to the powers and provisions applicable thereto as part of the estate of X deceased.

[3. The power of appointing a new trustee or new trustees of this conveyance is vested in Y during his life (*b*).]

[4. Acknowledgment and undertaking as to documents.]

[5. Certificate as to value.]

IN WITNESS *etc.*

Form 33

Release and Indemnity to Personal Representatives on Purchase of a House as a Residence for the Widow and her Children one of whom is an Infant, to accompany last Precedent. Variations where the deceased died intestate (*c*).

Parties. THIS RELEASE AND INDEMNITY is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Widow") of the first part

(*a*) See Notes to following Precedent.

(*b*) If the will contains an express power to appoint new trustees this should be repeated in the Conveyance.

(*c*) Trustees for sale have under s. 28 of the Law of Property Act, 1925, power to invest in the purchase of land. This was decided by the Court of Appeal in *Re Wellsted's Trusts*, [1949] 1 All E. R. 577. Administrators are trustees for sale under s. 33

B of *etc.* (hereinafter called " the Son ") of the second part C of *etc.* (hereinafter called " the Daughter ") of the third part and D of *etc.* and E of *etc.* (hereinafter called " the Personal Representatives ") of the fourth part

WHEREAS :— Recitals:

(1) X late of —— in the County of —— by his will dated the —— day of —— 19— after appointing the Personal Representatives to be the executors and trustees thereof and bequeathing certain pecuniary legacies devised and bequeathed all his real estate and the residue of his personal estate to his trustees UPON TRUST to sell and convert the same as therein mentioned and to invest the net proceeds of sale after payment of his funeral and testamentary expenses and debts and the legacies given thereby and to hold the said proceeds of sale and conversion and the investments from time to time representing the same upon trust to pay the income to his widow the Widow during her life and after her death in trust as well as to income as capital for all or any his children or child who being male attained the age of twenty-one years or being female attained that age or married under that age and if more than one in equal shares — will of testator;

(2) The said X died on the —— day of —— 19— without having revoked or altered his said will which was on the —— day of —— 19— duly proved by the Personal Representatives in the —— Probate Registry — death and probate;

[(1) X late of —— in the County of —— died on the —— day of —— 19— intestate and on the —— day of —— 19— letters of administration to his estate were granted out of the —— Probate Registry to the Personal Representatives] — [death intestate;]

(3) The said X had issue two children and no more *viz.* the Son and the Daughter who is an infant of the age of — years — state of family;

(4) The said X was at his death seised in fee simple in possession of the messuage known as —— aforesaid in which he and the Widow and the Son and Daughter resided up to his death — seisin of house;

(5) At the request of the Widow the Son and the Daughter the Personal Representatives sold the said messuage and invested the net proceeds of sale in the purchase in their names of another messuage known as —— situate in the County of —— as a residence for the Widow the Son and the Daughter which messuage was conveyed to the Personal Representatives on trust for sale by a conveyance bearing even date with but executed before these presents and made between Y of the one part and the Personal Representatives of the other part — sale of house and purchase of new residence:

(6) It was agreed upon such purchase being made that such release and indemnity should be given as are hereinafter contained and the name — agreement f indemnity.

---

of the Administration of Estates Act, 1925, and executors have under s. 39 all the powers of trustees for sale. The purchase can therefore be made by the personal representatives in their capacity as such and before any assent is made. But it appears from *Re Wellsted's Trusts*, *supra*, that only the proceeds of sale of other land of the testator or intestate can be so invested. In the case contemplated by this Precedent, the proceeds of sale of a house which has been found unsuitable owing to size or otherwise as a residence for the widow are to be invested in the purchase of another more suitable for the purpose, so there is no objection on this ground. The purchase of land as a residence was, however, held in *Re Power's Will Trusts*, [1947] 2 All E. R. 282, not to be an investment at all within a power to invest, and therefore, not within the powers of trustees for sale. This decision was not affected by *Re Wellsted's Trusts*, *supra*, and, therefore, an indemnity to the personal representatives is required on such a purchase.

of the Daughter has been inserted as a party hereto to the intent that she may if she thinks fit execute the same on attaining her majority but her failure so to do shall not prevent these presents being binding upon the other parties hereto.

NOW THIS DEED WITNESSETH as follows :—

Release.

1. The Widow the Son and the Daughter according to their respective estates and interests in the residuary estate of the said X hereby respectively ratify and confirm the said purchase of the said messuage and hereby release and discharge the Personal Representatives and each of them and their respective executors and administrators from all actions and proceedings claims and demands in respect of such purchase.

Covenant for indemnity and charge on beneficial interests.

2. Each of them the Widow the Son and the Daughter hereby covenants with the Personal Representatives and with each of them that they the said covenanting parties respectively and their respective executors and administrators will at all times hereafter keep the Personal Representatives and each of them and their and each of their executors and administrators effectually indemnified against all actions proceedings claims and demands on the part of any person or persons whomsoever and from all costs damages and expenses in respect of the purchase of the said messuage or otherwise relating to the premises and hereby charges his or her estate or interest in the real and personal estate of the said X deceased and the proceeds of sale and conversion thereof and the rents profits and income thereof with the payment of all monies payable by him or her under the covenant aforesaid.

House not to be sold without consent of widow.

3. It is hereby agreed that without prejudice to the powers of the Personal Representatives for purposes of administration the said messuage shall not be sold during the lifetime of the Widow under the trust for sale contained in the said conveyance of even date without her consent in writing but no purchaser shall be concerned to see that such consent has been given.

IN WITNESS *etc.*

Form 34

Deed Substituting other Property for Part of the Property comprised in a Mortgage (*a*).

Parties.

THIS SUBSTITUTED SECURITY is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called " the Borrower ") of the one part and B of *etc.* (hereinafter called " the Mortgagee ") of the other part

(*a*) The object of this form is to avoid the double stamp duty on a separate surrender and new mortgage by way of collateral security. The stamp will be 1s. per £100 for a substituted security. The form can be easily adapted to a case where, as sometimes happens, the mortgagee has concurred in a sale of part of the property on condition that other property is substituted. Where the property originally mortgaged is held under one title, the mortgagor should, if possible, obtain a separate acknowledgment for production of the deeds from the mortgagor; if he sells the part released he may not then be able to obtain one, as the mortgagee will not be a party to the conveyance, and could not be required to give an acknowledgment to the purchaser. If the mortgagor obtains such an acknowledgment as suggested from the mortgagee, the benefit will, if he sells, pass to the purchaser, and the mortgagor himself can also give the usual covenant for safe custody to take effect when the deeds come into his hands on payment off of the mortgage.

WHEREAS :— Recitals:

(1) These presents are supplemental to a legal charge (hereinafter called " the Principal Deed ") dated *etc.* and made between the Borrower of the one part and the Mortgagee of the other part whereby the freehold property firstly hereinafter described was (with other property) charged by way of legal mortgage with the payment to the Mortgagee of the principal sum of £x with interest thereon at the rate of £y per cent. per annum legal charg

(2) It has been agreed between the Mortgagee and the Borrower that the Mortgagee should release to the Borrower the property firstly hereinafter described discharged from the principal sum and interest secured by the Principal Deed in consideration of the property secondly hereinafter described being substituted as security therefor in manner hereinafter appearing agreement for substitu tion of oth property;

(3) The said principal sum of £x together with the current interest thereon is still owing on the security of the Principal Deed. state of debt.

NOW THIS DEED WITNESSETH as follows :—

1. In pursuance of the said agreement and in consideration of the legal charge hereinafter contained the Mortgagee AS MORTGAGEE hereby releases unto the Borrower ALL THAT *etc.* discharged from the said principal sum of £x and interest thereon secured by and from all charges claims and demands whatsoever under or by virtue of the Principal Deed. Release.

2. In further pursuance of the said agreement and in consideration of the release hereinbefore contained the Borrower AS BENEFICIAL OWNER hereby charges by way of legal mortgage ALL THAT *etc.* with the payment to the Mortgagee of the principal sum interest and other money secured by the Principal Deed to the intent that the same property may become in all respects substituted for the property hereinbefore released as a security for the payment of the said principal sum interest and other money. Legal char of new property.

3. All the covenants powers and provisions expressed or implied in the Principal Deed shall extend and apply to the property hereby charged as if the same had originally formed part of the property comprised therein and shall remain of full force and effect as regards the property remaining subject thereto notwithstanding the release hereinbefore contained. Covenants in principal deed to apply.

IN WITNESS *etc.*

Form 35

Mortgage of renewed Lease by way of Substituted Security for a Surrendered Lease.

THIS SUBSTITUTED SECURITY is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called " the Borrower ") of the one part and B of *etc.* (hereinafter called " the Mortgagee ") of the other part Parties.

WHEREAS :— Recitals:

(1) These presents are supplemental to a legal charge (hereinafter called " the Principal Deed ") dated *etc.* and made between the same parties who are parties hereto and in the same order whereby the principal mortgage;

premises comprised in and demised by a lease dated *etc.* and made between *etc.* were charged by way of legal mortgage with the payment to the Mortgagee of the principal sum of £x with interest thereon at the rate of £y per cent. per annum

surrender of lease;

(2) By a surrender bearing even date with but executed before these presents and made between the Mortgagee of the first part the Borrower of the second part and D (in whom the freehold reversion immediately expectant on the term granted by the said lease was vested) the premises comprised in and demised by the said lease were surrendered to the said D to the intent that the term of years thereby granted should merge

agreement for new lease:

(3) The said surrender was made with a view to the grant by the said D to the Borrower of a new lease for a term of —— years from the —— day of —— 19— and the Mortgagee concurred in such surrender upon an agreement by the Borrower to execute a charge by way of legal mortgage thereon as a substituted security for the payment of the principal sum and interest secured by the Principal Deed

grant of new lease;

(4) By a lease bearing even date with but executed before these presents and made between the said D of the one part and the Borrower of the other part the said D demised to the Borrower all the premises comprised in and demised by the said lease so surrendered as aforesaid for the term of —— years from the said —— day of —— 19— at the yearly rent of £z and subject to the covenants on the part of the lessee and the conditions therein contained

state of debt.

(5) The said principal sum of £x together with the current interest thereon is still owing on the security of the Principal Deed.

NOW THIS DEED WITNESSETH as follows:—

Legal charge.

1. In pursuance of the said agreement and of the premises the Borrower as BENEFICIAL OWNER hereby charges by way of legal mortgage ALL AND SINGULAR the premises comprised in or demised by the said lease of even date herewith with the payment to the Mortgagee of the principal sum interest and other money secured by the Principal Deed in manner thereby provided to the intent that the same lease may become in all respects substituted for the lease so surrendered as aforesaid as a security for the payment thereof.

Covenants in principal mortgage to apply.

2. All the covenants powers and provisions expressed or implied in the Principal Deed shall apply to the said lease of even date and the premises comprised therein.

Definition clause.

3. The expressions "the Borrower" and "the Mortgagee" shall where the context so admits include the estate owner for the time being of the lease hereby mortgaged and the persons deriving title under the Mortgagee respectively.

IN WITNESS *etc.*

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